

10-30-2015

Kosmann v. Gilbride Clerk's Record Dckt. 43296

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Other Claims

Date		Judge
1/25/2013	New Case Filed-Other Claims	Molly J Huskey
	Summons Issued	Molly J Huskey
	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Dinius, Kevin E (attorney for Kosmann, David A) Receipt number: 0005022 Dated: 1/25/2013 Amount: \$96.00 (Check) For: Kosmann, David A (plaintiff)	Molly J Huskey
1/28/2013	Motion for First (Automatic) Disqualification of Judge (Fax)	Molly J Huskey
	Notice Of Appearance - Shepard	Molly J Huskey
	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Shepherd, Ronald (attorney for Gilbride, Leo) Receipt number: 0005312 Dated: 1/28/2013 Amount: \$66.00 (Check) For: Gilbride, Leo (defendant)	Molly J Huskey
1/30/2013	Notice of Service of a Discovery Document (fax)	Molly J Huskey
1/31/2013	Order for First (Automatic) Disqualification of Judge	Molly J Huskey
	Change Assigned Judge	Juneal C. Kerrick
	Affidavit Of Service 1/27/13 Leo (fax)	Juneal C. Kerrick
2/4/2013	Order of Assignment	Juneal C. Kerrick
2/19/2013	Answer, Counterclaim and Demand for Jury Trial	Juneal C. Kerrick
2/26/2013	Request for Trial Setting (fax)	Juneal C. Kerrick
2/27/2013	Defendants/Counterclaimants Response To Request For Trial Setting	Juneal C. Kerrick
2/28/2013	Notice Of Taking Audio-Visual Deposition of Lio Gilbride -- Duces Tecu (fax)	Juneal C. Kerrick
3/4/2013	Notice Of Service of Discovery Responses	Juneal C. Kerrick
3/8/2013	Notice Of Service of Discovery Requests	Juneal C. Kerrick
3/12/2013	Answer to Counterclaim (fax)	Juneal C. Kerrick
4/9/2013	Notice of Service of a Discovery Document (Fax)	Juneal C. Kerrick
5/1/2013	Notice of Taking Deposition of David Kosmann	Juneal C. Kerrick
5/3/2013	Notice of Continued Audio-Visual Deposition of Leo Gilbride -- Duces Tecum Pursuant to Idaho Rule of Civil Procedure (fax)	Juneal C. Kerrick
5/7/2013	Amended Notice of Continued Audio-Visual Deposition of Leo Gilbride Duces Tecum (fax)	Juneal C. Kerrick
5/13/2013	Notice Of Service of A Discovery Document (fax)	Juneal C. Kerrick
6/11/2013	Defendant's Motion For Partial Summary Judgment	Juneal C. Kerrick
	Defendants Memorandum In Support of Motion For Partial Summary Judgment	Juneal C. Kerrick
	Affidavit of Ron R Shepherd	Juneal C. Kerrick
	Affidavit of Leo Gilbride	Juneal C. Kerrick
	Notice Of Hearing (Defendants Motion for Partial Summary Judgment) 7/11/13	Juneal C. Kerrick
6/12/2013	Hearing Scheduled (Motion Hearing 07/11/2013 09:00 AM) motn for partial summary judgmnt	Juneal C. Kerrick

Other Claims

Date		Judge
6/20/2013	Plnt's Rule 56(f) Motion (fax)	Juneal C. Kerrick
	Affidavit in Support of Plnt's Rule 56(f) Motion (fax)	Juneal C. Kerrick
	Notice Of Hearing 7/11/13 @ 9:00am (fax)	Juneal C. Kerrick
6/25/2013	Notice of Service of a Discovery Document	Juneal C. Kerrick
6/26/2013	Motion for Leave to File First Amended Complaint (fax)	Juneal C. Kerrick
	Notice Of Hearing-7/11/13 (fax)	Juneal C. Kerrick
6/27/2013	Affidavit of Michele Phillips	Juneal C. Kerrick
	Opposition to Defendant's Motion for Partial Summary Judgment	Juneal C. Kerrick
	Affidavit of David Kosmann In Support of Opposition to Defendant's Motion for Partial Summary Judgment	Juneal C. Kerrick
	Affidavit of Kevin E Dinius In Support of Opposition to Defendants Motion for Partial Summary Judgment	Juneal C. Kerrick
7/5/2013	Reply Brief in Support of Motion for Summary Jdmt	Juneal C. Kerrick
	Memorandum in Opposition to Plnt's Motion for Leave to File First Amended Complaint	Juneal C. Kerrick
	Memorandum in Opposition to Plnt's Rule 56(f) Motion	Juneal C. Kerrick
7/11/2013	Hearing result for Motion Hearing scheduled on 07/11/2013 09:00 AM: District Court Hearing Held Court Reporter: Kathy Klementson Number of Transcript Pages for this hearing estimated: less than 100 pages defn's motn for partial summary judgment / Plnt's Rule 56(f) Motn	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 07/11/2013 09:00 AM: Hearing Held defn's motn for partial summary judgment / Plnt's Rule 56(f) Motn	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 07/11/2013 09:00 AM: Motion Held defn's motn for partial summary judgment / Plnt's Rule 56(f) Motn	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 07/11/2013 09:00 AM: Motion to Continue Denied (Plnt's Rule 56(f) Motn)	Juneal C. Kerrick
	Motion for Partial Summary Judgment Denied in part - Court to render written decision on remaining issues.	Juneal C. Kerrick
8/9/2013	Order on Motion for Summary Judgment (plts motn to cont def summ judg-denied, defs motn for summ judg dismissing counts 1 & 3-granted, plts motn for leave to file amended comp, granted)	Juneal C. Kerrick
8/14/2013	First Amended Complaint and Demand for Jury Trial (fax)	Juneal C. Kerrick
	Motion for an Order to Mediate (fax)	Juneal C. Kerrick
	Notice Of Hearing 9/12/2013 (fax)	Juneal C. Kerrick
	Hearing Scheduled (Motion Hearing 09/12/2013 09:00 AM) Motion for Order to Mediate	Juneal C. Kerrick
8/19/2013	Request for Trial and Pretrial Setting (Fax)	Juneal C. Kerrick
8/20/2013	Motion for Leave to Amend Counterclaim	Juneal C. Kerrick
	Memorandum in Support of Motion for Leave to Amend Counterclaim	Juneal C. Kerrick

Other Claims

Date		Judge
8/20/2013	Notice Of Hearing 9-12-13	Juneal C. Kerrick
8/21/2013	Stipulation for Mediation (Fax)	Juneal C. Kerrick
8/23/2013	Notice of Service of a Discovery Document (Fax)	Juneal C. Kerrick
8/26/2013	Response to Request for Trial Setting (Fax)	Juneal C. Kerrick
9/5/2013	Motion for an Order to Deposit Funds (fax)	Juneal C. Kerrick
	Motion for an Order to Shorten time (fax)	Juneal C. Kerrick
	Notice Of Hearing 9-12-13 (fax)	Juneal C. Kerrick
	Affidavit of Kevin E Dinius in support of Motion for an Order to Deposit Funds (fax)	Juneal C. Kerrick
9/10/2013	Objection to Motion for an Order to Deposit Funds (fax)	Juneal C. Kerrick
9/12/2013	Hearing result for Motion Hearing scheduled on 09/12/2013 09:00 AM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: Less than 100	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 09/12/2013 09:00 AM: Hearing Held	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 09/12/2013 09:00 AM: Motion Held- Motion for Order to Mediate//Defendant's Motion to Amend Counterclaim//Plaintiff's Motion for an Order to Deposit Funds <<<Stip reached as to all motions-attys to prepare appropriate orders>>>	Juneal C. Kerrick
	Mediation Ordered	Juneal C. Kerrick
	Hearing Scheduled (Mediation - DC 10/24/2013 09:00 AM)	Stephen Dunn
9/17/2013	Answer to First amended Complaint and First Amended Counterclaim	Juneal C. Kerrick
9/20/2013	Order Granting Motion for Leave to Amend Counterclaim	Juneal C. Kerrick
9/26/2013	Notice of Service Re: Discovery (fax)	Juneal C. Kerrick
10/10/2013	Defendants Second Motion for Partial Summary Judgment	Juneal C. Kerrick
	Memorandum in Support of Defendants Second Motion for Partial Summary Judgment	Juneal C. Kerrick
	Affidavit of Leo Gilbride	Juneal C. Kerrick
	Notice Of Hearing	Juneal C. Kerrick
	Hearing Scheduled (Motion Hearing 11/07/2013 09:00 AM) Def Second Motion/Partial Summary Judgment	Juneal C. Kerrick
10/16/2013	Objection to Proposed Order to Deposit Funds (fax)	Juneal C. Kerrick
10/24/2013	Notice Of Hearing-11/7/13 (fax)	Juneal C. Kerrick
	Opposition to Defendants Second Motion for Partial Summary Judgment (fax)	Juneal C. Kerrick
	Motion to Strike and Disregard Certain Testimony of Leo Gilbride (fax)	Juneal C. Kerrick
	Memorandum in Support of Motion to Strike and Disregard Certain Testimony of Leo Gilbride (fax)	Juneal C. Kerrick
	Notice Of Hearing 11-7-13 (fax)	Juneal C. Kerrick
10/25/2013	Defendants Motion for Partial Reconsideration (fax)	Juneal C. Kerrick

Other Claims

Date		Judge
10/25/2013	Memorandum in Support of Motion for Partial Reconsideration of the Courts Order on Motion for Summary Judgment (fax)	Juneal C. Kerrick
	Notice Of Hearing 11-7-13 (fax)	Juneal C. Kerrick
10/31/2013	Opposition to Defendants Motion for Partial Reconsideration (fax)	Juneal C. Kerrick
11/7/2013	Hearing result for Motion Hearing scheduled on 11/07/2013 09:00 AM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: Less than 100	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 11/07/2013 09:00 AM: Hearing Held	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 11/07/2013 09:00 AM: Motion Held- Defendant's Second Motion for Summary Judgment---Defendant's Motion for Partial Reconsideration---Plaintiff's Motion to Strike--Objection to Proposed Order to Deposit Funds--	Juneal C. Kerrick
	Motion Denied	Juneal C. Kerrick
11/12/2013	Request for Trial Setting (fax)	Juneal C. Kerrick
11/14/2013	Order Denying Defn's Second Motion for Partial Summary Judgment and Motion for Partial Reconsideration	Juneal C. Kerrick
	Order to Defosit Funds	Juneal C. Kerrick
11/19/2013	Plaintiff's Response For Request For Trial Setting (fax)	Juneal C. Kerrick
11/21/2013	Order Setting Case for trial and pretrial conference	Juneal C. Kerrick
	Hearing Scheduled (Jury Trial 12/02/2014 09:00 AM) 4 - day	Juneal C. Kerrick
	Hearing Scheduled (Pre Trial 10/14/2014 08:30 AM)	Juneal C. Kerrick
12/3/2013	Notice Of Service of Discovery Requests (fax)	Juneal C. Kerrick
12/4/2013	Stipulation for Scheduling and Planning (fax)	Juneal C. Kerrick
12/18/2013	Notice Of Hearing (fax)	Juneal C. Kerrick
	Hearing Scheduled (Motion Hearing 01/09/2014 09:00 AM) Defn's Motion to Releas Funds	Juneal C. Kerrick
	Defn's Motn for Order to Release Funds (fax)	Juneal C. Kerrick
12/20/2013	Notice Of Taking Deposition of Michele Phillips (fax)	Juneal C. Kerrick
	Notice Of Taking Deposition of Justin Mccarthy (fax)	Juneal C. Kerrick
12/24/2013	Notice Of Taking Audio Visual Deposition of Justin MccarthyDuces tecum Pursuant to Idaho Rule of Civil Procedure 30 (b) (4) (fax)	Juneal C. Kerrick
1/3/2014	Notice of Service of a Discovery Document (Fax)	Juneal C. Kerrick
1/7/2014	Stipulation to Release Funds	Juneal C. Kerrick
1/8/2014	Hearing result for Motion Hearing scheduled on 01/09/2014 09:00 AM: Hearing Vacated Defn's Motion to Releas Funds	Juneal C. Kerrick
	Order to Release Funds	Juneal C. Kerrick
2/14/2014	Affidavit Of Service-2-12-14 Justin McCarthy Sub (fax)	Juneal C. Kerrick
3/7/2014	Defendants Disclosure of Expert Witness	Juneal C. Kerrick
	Notice Of Service of Discovery Responses	Juneal C. Kerrick

Other Claims

Date		Judge
3/20/2014	Notice of Service Re: Discovery Responses (Def Third Suppl (fax	Juneal C. Kerrick
4/7/2014	Miscellaneous Payment: CD Copies Paid by: Kosmann, David A Receipt number: 0023254 Dated: 4/7/2014 Amount: \$6.25 (Check)	Juneal C. Kerrick
4/10/2014	Subpoena Duces Tecum to Fairway Independent Mortgage Corporation (fax)	Juneal C. Kerrick
	Affidavit Of Service 4/8/14 (fax)	Juneal C. Kerrick
4/14/2014	Subpoena Duces Tecum to Canyon County Development Services (fax)	Juneal C. Kerrick
	Affidavit Of Service - (fax)	Juneal C. Kerrick
5/21/2014	Defendants Third Motion for Partial Summary Judgment	Juneal C. Kerrick
	Affidavit of Ron R Shepherd in Support of Defendants Third Motion for Partial Summary Judgment	Juneal C. Kerrick
	Memorandum in Support of Defendants Third Motion for Partial Summary Judgment	Juneal C. Kerrick
	Notice Of Hearing 7-10-14	Juneal C. Kerrick
	Hearing Scheduled (Motion Hearing 07/10/2014 09:00 AM) defs third motn for partial summ judg	Juneal C. Kerrick
6/26/2014	Opposition to Defendant's Third Motion for Partial Summary Judgment	Juneal C. Kerrick
	Declaration of David Kosmann in Support of Opposition to Defendant's Third Motion for Partial Summary Judgment	Juneal C. Kerrick
7/10/2014	Hearing result for Motion Hearing scheduled on 07/10/2014 09:00 AM: Hearing Held defs third motn for partial summ judg	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 07/10/2014 09:00 AM: Case Taken Under Advisement defs third motn for partial summ judg	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 07/10/2014 09:00 AM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: less than 100 pages	Juneal C. Kerrick
7/24/2014	Order on Defendant's Third Motion for Summary Judgment-DENIED	Juneal C. Kerrick
8/4/2014	Notice Of Taking Audio-Visual Deposition of Eric Arthur--Duces Tecum (fax)	Juneal C. Kerrick
	Notice Of Service of a Discovery Document (fax)	Juneal C. Kerrick
8/27/2014	Stipulation for Substitution Of Counsel-for Defendant (fax	Juneal C. Kerrick
8/28/2014	Amended Notice Of Taking Audio-Visual Deposition of Eric Arthur-Duces Tecum Pursuant to Idaho Rule of Civil Procedure 30 (b) (4) fax	Juneal C. Kerrick
	Amended Deposition Subpoena Duces Tecum to Eric Arthur (fax	Juneal C. Kerrick
8/29/2014	Notice of Telephonic Status Conference 9-4-14 (fax)	Juneal C. Kerrick
	Hearing Scheduled (Conference - Status 09/04/2014 11:00 AM) telephonic	Juneal C. Kerrick
9/4/2014	Hearing result for Conference - Status scheduled on 09/04/2014 11:00 AM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: Less than 100	Juneal C. Kerrick

Other Claims

Date		Judge
9/4/2014	Hearing result for Conference - Status scheduled on 09/04/2014 11:00 AM: Hearing Held	Juneal C. Kerrick
	Hearing result for Jury Trial scheduled on 12/02/2014 09:00 AM: Hearing Vacated 4 - day	Juneal C. Kerrick
	Hearing Scheduled (Jury Trial 01/27/2015 09:00 AM) 4 days	Juneal C. Kerrick
9/8/2014	Amended Order Setting Pretrial Conference and Jury Trial	Juneal C. Kerrick
9/15/2014	Stipulation to Reset Pre Trial Conference (fax)	Juneal C. Kerrick
9/26/2014	Stipulation to Amend Order to Deposit Funds (w/order) (Fax)	Juneal C. Kerrick
10/2/2014	Order Amending Order to Deposit Funds	Juneal C. Kerrick
	Order Resetting Pre-Trial Conference	Juneal C. Kerrick
	Hearing result for Pre Trial scheduled on 10/14/2014 08:30 AM: Hearing Vacated	Juneal C. Kerrick
	Hearing Scheduled (Pre Trial 11/06/2014 08:30 AM) Pre Trial Conference	Juneal C. Kerrick
11/6/2014	Hearing result for Pre Trial scheduled on 11/06/2014 08:30 AM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: Less than 100	Juneal C. Kerrick
	Hearing result for Pre Trial scheduled on 11/06/2014 08:30 AM: Hearing Held	Juneal C. Kerrick
	Hearing result for Pre Trial scheduled on 11/06/2014 08:30 AM: Notice Of Hearing	Juneal C. Kerrick
	Hearing Scheduled (Conference - Status 01/09/2015 09:30 AM) {BLOCK 1 HR}	Juneal C. Kerrick
12/1/2014	Notice Of Service of Defn's fourth supplemental response (fax)	Juneal C. Kerrick
12/2/2014	Notice Of Service of a Discovery Document (fax)	Juneal C. Kerrick
12/23/2014	Plaintiff's Pre-Trial Brief (Fax)	Juneal C. Kerrick
	Plaintiff's Witness and Exhibit List (Fax)	Juneal C. Kerrick
	Plaintiff's Proposed Jury Instructions Filed (Fax)	Juneal C. Kerrick
12/26/2014	Notice Of Service (fax)	Juneal C. Kerrick
12/30/2014	Defendants Witness List	Juneal C. Kerrick
	Defendants Proposed Jury Instructions	Juneal C. Kerrick
	Defendants Exhibit List	Juneal C. Kerrick
12/31/2014	Defendant's Pre-trial Memorandum (fax)	Juneal C. Kerrick
	Notice Of Service (fax)	Juneal C. Kerrick
1/2/2015	Notice Of Service (fax)	Juneal C. Kerrick
1/8/2015	Declaration of Kevin E. Dinius In Support of Plaintiff's Motion in Limine	Juneal C. Kerrick
	Plaintiff's Motion in Limine	Juneal C. Kerrick
1/9/2015	Hearing result for Conference - Status scheduled on 01/09/2015 09:30 AM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: Less than 100	Juneal C. Kerrick

Other Claims

Date		Judge
1/9/2015	Hearing result for Conference - Status scheduled on 01/09/2015 09:30 AM: Hearing Held	Juneal C. Kerrick
	Hearing Scheduled (Motion Hearing 01/21/2015 01:30 PM) {BLOCK p.m.} Motion in Limine	Juneal C. Kerrick
	(Plaintiff's) Notice Of Hearing (Mot in Limine)	Juneal C. Kerrick
1/13/2015	Defendant's Response to Plaintiff's Motion in Limine	Juneal C. Kerrick
	Affidavit of Counsel in Opposition to Plaintiff's Motion in Limine	Juneal C. Kerrick
1/14/2015	Affidavit Of Service-Justin 1-12-15 (Subpoena) (fax)	Juneal C. Kerrick
1/16/2015	Affidavit Of Service-1-15-15 Subpoena Justin (fax)	Juneal C. Kerrick
1/21/2015	Hearing result for Motion Hearing scheduled on 01/21/2015 01:30 PM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: Less than 100	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 01/21/2015 01:30 PM: Motion Held- Plaintiff's Motion in Limine -{Denied with regard to exclusion of witnesses and reserved ruling on documentary evidence}	Juneal C. Kerrick
1/26/2015	Order on Plaintiff's Motion in Limine	Juneal C. Kerrick
	Defendant's Supplemental Pre-trial Memorandum Re: Illegality of Contract (FAX)	Juneal C. Kerrick
	Defendant's Supplemental Proposed Jury Instructions (FAX)	Juneal C. Kerrick
	Defendant's Supplemental Proposed Special Verdict Form (FAX)	Juneal C. Kerrick
	Plaintiff's Supplemental Pre- Trial Brief	Juneal C. Kerrick
	Declaration of Kevin E. Dinius in support of Plaintiff's Supplemental Pre-Trial Brief	Juneal C. Kerrick
	Declaration of Cameron McFaddan	Juneal C. Kerrick
1/27/2015	Hearing result for Jury Trial scheduled on 01/27/2015 09:00 AM: Jury Trial Started	Juneal C. Kerrick
	Hearing result for Jury Trial scheduled on 01/27/2015 09:00 AM: Jury Instructions Filed	Juneal C. Kerrick
1/28/2015	Hearing result for Jury Trial scheduled on 01/27/2015 09:00 AM: Hearing Held {JT day 2}	Juneal C. Kerrick
1/29/2015	Hearing result for Jury Trial scheduled on 01/27/2015 09:00 AM: Hearing Held {JT day 3}	Juneal C. Kerrick
	Hearing result for Jury Trial scheduled on 01/27/2015 09:00 AM: Motion Held {Defendant's Motion to Dismiss Case Under Rule 41(b) and Rule 50(a) of the I.R.C.P.	Juneal C. Kerrick
	Hearing result for Jury Trial scheduled on 01/27/2015 09:00 AM: Motion Granted {Specific Performance Claim}	Juneal C. Kerrick
	Motion Denied-{ Unjust Enrichment Claim} -Reserved Ruling on Fraud Claim	Juneal C. Kerrick
	Court Trial Started-{Changed from JT to CT based on Stipulation of parties}	Juneal C. Kerrick
	Miscellaneous-Court Reporter's Estimated Costs of a Transcript of the Record for Appeal Purposes {\$1,800.}	Juneal C. Kerrick

Other Claims

Date		Judge
2/13/2015	Defendants Post Trial Memorandum (fax)	Juneal C. Kerrick
	Defendants Proposed Findings of Fact and Conclusions of Law (fax)	Juneal C. Kerrick
	Plaintiff's Post-Trial Brief	Juneal C. Kerrick
	Plaintiff's Proposed Findings of Fact and Conclusions of Law	Juneal C. Kerrick
3/30/2015	Memorandum Decision Following Court Trial	Juneal C. Kerrick
	Judgment (Counts I,II,III,V of Amended Comp Dismissed with Prej, Plt shall Recover \$30,990.00 against Def on Count IV of the amended Comp ,Count I of Counterclaim Dismissed with Prej, Count II of Counterclaim Def shall Recover from Plt Possession of Real Property, Count III of Counterclaim Dismissed without Prej)	Juneal C. Kerrick
	Civil Disposition Judgment entered for: Gilbride, Leo, Defendant; Kosmann, David A, Plaintiff. Filing date: 3/30/2015	Juneal C. Kerrick
	Case Status Changed: Closed	Juneal C. Kerrick
	Plaintiff's Motion for Reconsideration (fax)	Juneal C. Kerrick
3/31/2015	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Dinius Law Receipt number: 0020011 Dated: 3/31/2015 Amount: \$1.00 (Check)	Juneal C. Kerrick
	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Dinius Law Receipt number: 0020011 Dated: 3/31/2015 Amount: \$1.00 (Check)	Juneal C. Kerrick
4/10/2015	Defendant's Motion for Attorney Fees and Costs	Juneal C. Kerrick
	Affidavit of Ron Shepherd	Juneal C. Kerrick
	Defendant's Memorandum of Court Costs and Attorney Fees	Juneal C. Kerrick
	Plaintiffs Amended Motion to Reconsider and to Amend Findings and Conclusions of the Memorandum Decision and Judgment (fax)	Juneal C. Kerrick
	Memorandum in Support Plaintiffs Amended Motion to Reconsider and to Amend Findings and Conclusions of the Memorandum Decision and Judgment (fax)	Juneal C. Kerrick
4/13/2015	Notice Of Hearing - 05.14.15 (Fax) - Not Good Date	Juneal C. Kerrick
	Amended Notice of Hearing - 05.07.15 (Fax)	Juneal C. Kerrick
	Hearing Scheduled (Motion Hearing 05/07/2015 09:00 AM) Plt's Motn to Reconsider & Amend Findings	Juneal C. Kerrick
	Case Status Changed: Closed pending clerk action	Juneal C. Kerrick
	Plaintiff's Motion for Attorney Fees and Costs	Juneal C. Kerrick
	Affidavit of Kevin E. Dinius in Support of Plaintiff's Motion for Attorney Fees and Costs	Juneal C. Kerrick
	Memorandum in Support of Plaintiff's Motion for Attorney Fees and Costs	Juneal C. Kerrick
4/20/2015	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Kosmann, David A Receipt number: 0024015 Dated: 4/20/2015 Amount: \$2.00 (Cash)	Juneal C. Kerrick
4/21/2015	Order on Plaintiff's Motion to Amend Findings	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 05/07/2015 09:00 AM: Hearing Vacated Plt's Motn to Reconsider & Amend Findings	Juneal C. Kerrick

Other Claims

Date		Judge
4/23/2015	Writ Issued Canyon Co	Juneal C. Kerrick
	Miscellaneous Payment: Writs Of Execution Paid by: Dinius & Associates Receipt number: 0025233 Dated: 4/23/2015 Amount: \$2.00 (Check)	Juneal C. Kerrick
4/27/2015	Defendant's Motion to Disallow Plaintiff's Claimed Costs and Attorney's Fees (fax)	Juneal C. Kerrick
	Memorandum in Support of Defendant's Motion to Disallow Plaintiff's Claimed Costs and Attorney's Fees (fax)	Juneal C. Kerrick
	Notice Of Hearing	Juneal C. Kerrick
	Hearing Scheduled (Motion Hearing 06/11/2015 09:00 AM) Defs Mot to Disallow Plaintiff's Claimed Costs & Fees	Juneal C. Kerrick
	Memorandum in Opposition of Defendants Motion for Attorney Fees and Costs (fax)	Juneal C. Kerrick
4/28/2015	Notice Of Hearing 6-11-15 (fax)	Juneal C. Kerrick
5/18/2015	Affidavit of Interest Due (fax)	Juneal C. Kerrick
5/19/2015	Writ Returned - Original	Juneal C. Kerrick
	Writ Issued - Canyon County	Juneal C. Kerrick
	Miscellaneous Payment: Writs Of Execution Paid by: Dinius & Associates Receipt number: 0030264 Dated: 5/19/2015 Amount: \$2.00 (Check)	Juneal C. Kerrick
6/2/2015	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Dinius, Kevin E (attorney for Kosmann, David A) Receipt number: 0032940 Dated: 6/2/2015 Amount: \$129.00 (Check) For: Kosmann, David A (plaintiff)	Juneal C. Kerrick
	Appealed To The Supreme Court	Juneal C. Kerrick
	Notice of Appeal-Plaintiff	Juneal C. Kerrick
	Bond Posted - Reporters Fee (Receipt 32942 Dated 6/2/2015 for 100.00)(Record)	Juneal C. Kerrick
	Defendant's Motion for Stay of Execution and Motion to Shorten Time (fax)	Juneal C. Kerrick
	Notice Of Hearing (fax)	Juneal C. Kerrick
6/4/2015	Memorandum in response to plaiIntiff's objection to defendant's motion for costs and attorney fees	Juneal C. Kerrick
6/9/2015	Objection to Defendant's Motion for Stay of Execution and Motion to Shorten Time (Fax)	Juneal C. Kerrick
6/11/2015	Hearing result for Motion Hearing scheduled on 06/11/2015 09:00 AM: District Court Hearing Held Court Reporter: Kathy Klemetson Number of Transcript Pages for this hearing estimated: Less than 100	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 06/11/2015 09:00 AM: Hearing Held	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 06/11/2015 09:00 AM: Motion Held-Defs Mot to Disallow Plaintiff's Claimed Costs & Fees/plts opposition to defendants motn for fees and costs {Written Ruling to be issued}	Juneal C. Kerrick

Other Claims

Date		Judge
6/11/2015	Hearing result for Motion Hearing scheduled on 06/11/2015 09:00 AM: Motion Held- Defendant's Motion to Stay Execution-	Juneal C. Kerrick
	Hearing result for Motion Hearing scheduled on 06/11/2015 09:00 AM: Motion Granted- Defendant's Motion to Stay Execution-pending further order of the Court on the attorney fees and costs-	Juneal C. Kerrick
	Order granting motion for stay of execution	Juneal C. Kerrick
6/18/2015	Order on Motions to Disallow Costs and Fees	Juneal C. Kerrick
6/19/2015	Order Vacating Order Granting Stay of Execution	Juneal C. Kerrick
7/2/2015	Amended Judgment \$1,732.25 (against Plaintiff)	Juneal C. Kerrick
7/7/2015	Affidavit of Interest Due (fax)	Juneal C. Kerrick
7/8/2015	Writ Issued Canyon	Juneal C. Kerrick
	Miscellaneous Payment: Writs Of Execution Paid by: Dinius Law Receipt number: 0040141 Dated: 7/8/2015 Amount: \$2.00 (Check)	Juneal C. Kerrick
7/10/2015	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Reid, James G (attorney for Gilbride, Leo) Receipt number: 0040549 Dated: 7/10/2015 Amount: \$129.00 (Check) For: Gilbride, Leo (defendant)	Juneal C. Kerrick
	Appealed To The Supreme Court (Def Cross Appeal	Juneal C. Kerrick
	Defendant's Notice of Cross-Appeal	Juneal C. Kerrick
7/16/2015	S C - Order Conditionally Dismissing Appeal	Juneal C. Kerrick
7/28/2015	Defendant's motion for stay of execution and permission to Deposit Funds (Fax)	Juneal C. Kerrick
7/29/2015	S C - Order Granting Motion to Dismiss (for Plaintiff Kosmann)	Juneal C. Kerrick
	Partial Remittitur (for Plaintiff Kosmann)	Juneal C. Kerrick
8/5/2015	Writ Returned Unsat	Juneal C. Kerrick
8/6/2015	Stipulation For Substitution of Counsel (fax)	Juneal C. Kerrick
8/7/2015	Notice of attorney fees lien	Juneal C. Kerrick
	Order Granting Defendants Motion for Stay of Execution and Permission to Deposit Funds (to deposit \$38,590.54)	Juneal C. Kerrick
	Inactive	Juneal C. Kerrick
	Case Status Changed: Inactive	Juneal C. Kerrick
	Bond Posted - Cash (Receipt 45950 Dated 8/7/2015 for 38590.54)	Juneal C. Kerrick
	Proof of Service by Mail - Def (fax)	Juneal C. Kerrick
8/10/2015	Bond Posted - Cash (Receipt 46160 Dated 8/10/2015 for 102.05)(Clerk's Record)	Juneal C. Kerrick
8/11/2015	Defendant's AMENDED Notice of Appeal (fax)	Juneal C. Kerrick
8/14/2015	Writ Returned	Juneal C. Kerrick
	Bond Posted - Cash (Receipt 47314 Dated 8/14/2015 for 200.00)(Deposit Transcript)	Juneal C. Kerrick
9/16/2015	S C - Order RE: Payment of Fee for Transcripts	Juneal C. Kerrick

FILED
A.M. 4:20 P.M.

JAN 25 2013

CANYON COUNTY CLERK
SP DEPUTY

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101
ISB Nos. 5974, 7997
kdinius@diniuslaw.com
mhanby@diniuslaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,

Plaintiff,

-vs-

LEO GILBRIDE,

Defendant.

CASE NO. CV13-795-C

COMPLAINT AND DEMAND FOR
JURY TRIAL

Fee Category: A
Filing Fee: \$96.00

COMES NOW, Plaintiff DAVID KOSMANN, by and through his attorneys of record,
the law firm of Dinius & Associates, PLLC, for and against the above-named Defendant, LEO
GILBRIDE, COMPLAINS and ALLEGES as follows:

PARTIES, JURISDICTION AND VENUE

1. At all times herein mentioned, Plaintiff DAVID KOSMANN (hereinafter,
"Kosmann") was a resident of Canyon County, Idaho.

COMPLAINT AND DEMAND FOR JURY TRIAL - 1

2. At all times relevant herein, Defendant LEO GILBRIDE (hereinafter, "Gilbride") was a resident of Canyon County, Idaho.

3. All of the acts complained of herein occurred in Canyon County, Idaho, making jurisdiction proper in this court.

4. Venue is proper pursuant to Idaho Code § 5-404.

GENERAL ALLEGATIONS

5. This case involves the following property: Lot 6, Block 1 of DUNN'S PLAT, Canyon County, Idaho, according to the official plat thereof, filed in Book 14 of Plats at Page 35, records of said County, commonly known as 1020 W. Homedale Road, Caldwell, Idaho 83607.

6. Kosmann was the owner of the Property when he fell behind on the mortgage payments.

7. In an effort to avoid foreclosure, Gilbride agreed to purchase the Property through a short-sale with GMAC Mortgage.

8. It was agreed that Kosmann would pay Gilbride more than \$31,000 so that Gilbride would have sufficient funds to close on the property.

9. Additionally, it was agreed that Kosmann would pay the monthly payments for several months, until such time the loan was paid off, at which time, Gilbride would convey the Property back to Kosmann.

10. Until that time, it was agreed that Kosmann could continue to live at the Property as a tenant.

11. Kosmann provided more than \$31,000 to Gilbride as agreed and the sale of the Property closed on December 28, 2012.

12. The parties were jointly represented by real estate agent Justin McCarthy of Realty Management Associates, Inc. in the transaction.

13. Mr. McCarthy was aware of the agreement between Kosmann and Gilbride, as described above.

14. Despite the parties' agreement, and despite the fact that Gilbride was paid more than \$31,000 to effectuate the parties' contract, Gilbride posted an 'eviction' notice to Kosmann less than two weeks after the closing.

15. Further, upon information and belief, Gilbride is already attempting to re-finance the property.

16. These actions affirmatively demonstrate that Gibride does not intend to honor the agreement and has material breached that agreement.

COUNT I
Breach of Contract

17. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

18. The agreement for Gilbride to transfer the Property back to Kosmann, as described above, constitutes a binding contract.

19. The more than \$31,000 paid to Gilbride by Kosmann is evidence both of consideration and partial performance of the contract.

20. The refusal of Gilbride to honor the terms of the contract, as described above, constitutes a material breach of the contract.

21. As a result of Defendant Gilbride's breach, Kosmann has been damaged in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

COUNT II
Specific Performance

22. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

23. Gilbride has failed to abide by the terms of the agreement by attempting to evict Kosmann from the Property and refusing to transfer the Property back to Kosmann as agreed.

24. Kosmann has complied with all the terms and conditions to be performed by him under the agreement and is ready, willing, and able to perform any remaining terms and conditions of the agreement.

25. As a result of Defendant Gilbride's breach, Kosmann has been damaged in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

COUNT III
Breach of the Implied Covenant of Good Faith and Fair Dealing

26. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

27. Gilbride had a duty, pursuant to the agreement, to act in good faith and deal fairly with Kosmann.

28. Gilbride's failure to abide by the terms of the agreement, as described above, breached Gilbride's duty of good faith and fair dealing inherent in the agreement between the parties.

29. As a result of Defendant Gilbride's breach, Kosmann has been damaged in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

COUNT IV
Unjust Enrichment

30. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

31. Kosmann conferred a benefit upon Gilbride by providing the funds necessary to close the transaction and in agreeing to transfer the Property, with the expectation that it would be transferred back.

32. Gilbride was aware of and appreciated the benefits conferred upon him by Kosmann.

33. It is inequitable for Gilbride to retain the benefits described above without compensating Kosmann.

34. As a result of Gilbride's failure to abide by the terms of the agreement, Gilbride has been unjustly enriched in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

ATTORNEY'S FEES AND COSTS

Plaintiff is entitled to recover his costs and attorney's fees incurred in prosecuting this action, pursuant to Idaho Code §§ 12-120; 12-121, I.R.C.P. 54, and all other applicable state law.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial composed of no less than twelve (12) persons on all issues so triable, pursuant to Idaho Rule of Civil Procedure 38.

WHEREFORE, Plaintiff prays for Judgment, Order and Decree of this Court as follows:

1. For money damages from the Defendant, that fully and fairly compensate Plaintiff for Defendant's for breach and other causes of action above in a sum to be determined at trial in excess of \$10,000.00;
2. For an award of Plaintiff's reasonable attorney fees incurred in pursuing this action, pursuant to Idaho Code §§ 12-120(1), 12-121 and I.R.C.P. 54;
3. For costs of suit incurred herein; and,
4. For such other and further relief as to the Court is just and equitable.

DATED this 16th day of January, 2013.

DINIUS LAW

By: 

Kevin E. Dinius

Michael J. Hanby II

Attorneys for Plaintiff

F I L E D
A.M. 3:40 P.M.

FEB 19 2013

CANYON COUNTY CLERK
DEPUTY

RON R. SHEPHERD
HAMILTON, MICHAELSON & HILTY, LLP

Attorneys at Law
1303 12th Avenue Road
PO Box 65
Nampa, ID 83653-0065
Telephone: (208) 467-4479
Facsimile: (208) 467-3058
ISB No. 6593
rshepherd@nampalaw.com

Attorneys for Defendant/Counterclaimant

**IN THE DISTRICT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

DAVID KOSMANN,	)	Case No. CV-2013-795-C
)	
Plaintiff/Counterdefendant,)	
)	
v.	)	ANSWER, COUNTERCLAIM AND
	)	DEMAND FOR JURY TRIAL
)	
LEO GILBRIDE,)	
)	
Defendant/Counterclaimant.)	
)	
)	

The above named Defendant, Leo Gilbride ("Gilbride"), by and through his counsel of record, Ron R. Shepherd of the law firm of Hamilton, Michaelson & Hilty, LLP, in answer to the Complaint and Demand for Jury Trial ("Complaint") previously filed in this action on January 25, 2013 by the Plaintiff above named, admits, denies and alleges as follows:

ANSWER

1. Gilbride denies each and every allegation of the Complaint that is not specifically admitted herein.

2. Gilbride admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 7 and 15.
3. Gilbride denies the allegations contained in paragraphs 8, 9, 10, 13, 16, 18, 19, 20, 21, 23, 24, 25, 27, 28, 29, 31, 32, 33 and 34.
4. Answering paragraph 6, Gilbride admits that Plaintiff David Kosmann ("Kosmann") was previously the owner of the Subject Property. It was Gilbride's understanding that Kosmann was behind on his mortgage.
5. Answering paragraph 11, Gilbride admits that the sale of the property from Kosmann to Gilbride closed on December 28, 2012. Gilbride denies the remaining allegations of paragraph 11.
6. Answering paragraph 12, Gilbride admits that Justin McCarthy was the real estate agent involved in the sale of the property from Kosmann to Gilbride.
7. Answering paragraph 14, Gilbride admits that he posted an eviction notice on Gilbride's property after Gilbride purchased the Subject Property. Gilbride denies the remaining allegations of paragraph 14.

Affirmative Defenses

8. Kosmann's claims are barred and unenforceable under the statute of frauds set forth at Idaho Code § 9-503 and/or 9-508 as Kosmann alleged agreement is not in writing.
9. Kosmann signed declarations and other documents specifically stating that the sale of the property from Kosmann to Gilbride was an arm's-length transaction and that Kosmann and Gilbride did not have an agreement to sell the property back to Kosmann. As such, Kosmann committed fraud in such transaction and therefore does not come into court with clean hands. Kosmann cannot obtain the relief he seeks under the doctrine of unclean hands.

10. Kosmann made representations to Gilbride, and Gilbride relied on those representations to his detriment in purchasing the Subject Property from Kosmann. As such, Kosmann's claims are barred under the doctrines of promissory estoppel and/or quasi estoppel.

11. Kosmann's claims are barred under the doctrine of estoppel by deed.

12. Kosmann has failed to state a claim upon which relief may be granted.

COUNTERCLAIM

The above-named Defendant/Counterclaimant, Leo Gilbride ("Gilbride") for his causes of action against the Plaintiff/Counterdefendant David Kosmann ("Kosmann"), alleges and states as follows:

Parties

13. Gilbride is an adult resident of Canyon County, Idaho.

14. Kosmann is an adult resident of Canyon County, Idaho

Jurisdiction and Venue

15. Both jurisdiction and venue are proper in this court for the reasons set forth in Kosmann's Complaint at ¶¶ 3 and 4.

General Allegations

16. Gilbride purchased real property from Kosmann and obtained a warranty deed from Kosmann. The real property is located at 1020 West Homedale Road, Caldwell, Canyon County, Idaho ("Subject Property"), and is more particularly described in the Warranty Deed attached hereto as Exhibit "A" and incorporated herein by this reference.

17. Attached hereto as Exhibit "B" and incorporated herein by this reference is a true and correct copy of the Real Estate Purchase and Sale Agreement ("PSA") entered into by and

between Kosmann and Gilbride in which Kosmann agreed to sell the Subject Property to Gilbride.

18. Gilbride fully performed under the PSA by paying the full purchase price to Kosmann.

19. The transaction closed on December 28, 2012.

20. Despite having sold the Subject Property to Gilbride, Kosmann remains in possession of the Subject Property and refuses to allow Gilbride access to the Subject Property or to otherwise take possession of the Subject Property.

21. Upon information and belief, Kosmann is operating a business on the Subject Property and storing numerous unoperable vehicles on the Subject Property in violation of the law.

22. As such, time is of the essence in ejecting Kosmann from the Subject Property.

Incorporation by Reference

23. Each and every allegation set forth in this Answer and Counterclaim are incorporated in each and every count of this Counterclaim.

Count I
(Breach of Contract)

24. Paragraph 36 of the PSA states that "BUYER shall be entitled to possession upon closing."

25. The transaction closed on December 28, 2012.

26. Kosmann's refusal to vacate the Subject Property and to deliver possession of the Subject Property to Gilbride constitutes a material breach of the PSA.

27. As a direct and proximate result of Kosmann's refusal to deliver possession of the Subject Property to Gilbride, Gilbride has been damaged in an amount to be proven at trial.

Gilbride's damages are ongoing and include, among other things, the fair market rental value of the Subject Property, plus the cost to remove Kosmann's personal property and effects from the Subject Property.

Count II
(Ejectment)

28. Gilbride is the owner of the Subject Property as evidenced by the duly recorded Warranty Deed executed by Kosmann, a copy of which is attached hereto.

29. Kosmann refuses to deliver possession of the Subject Property to Gilbride.

30. Gilbride is therefore entitled to a Decree ejecting Kosmann from the Subject Property and delivering possession thereof to Gilbride.

Costs and Attorney Fees

31. Gilbride has been required to retain the law offices of Hamilton, Michaelson & Hilty, LLP, duly licensed and practicing attorneys of the state of Idaho, to defend against Kosmann's claims and to institute and prosecute Gilbride's counterclaims. Gilbride is entitled to recover his costs and attorney fees reasonably incurred in this action under Idaho Code §§ 12-120(3), 12-121, as well as Rule 54(d) and 54(e) of the Idaho Rules of Civil Procedure and paragraph 28 of the parties' PSA attached hereto.

Prayer for Relief

WHEREFORE, Gilbride prays for relief as follows:

1. That Kosmann's complaint be dismissed with prejudice and Kosmann take nothing thereunder;

2. For the entry of a decree establishing that Gilbride is the lawful owner of the Subject Property and ejecting Kosmann from the Subject Property;

3. For a writ of assistance, in aid of a decree of ejectment, directing the Sheriff of Canyon County to remove Kosmann and his personal property and effects from the Subject Property;

4. For a money judgment against Kosmann and in favor of Gilbride for all damages Gilbride has suffered and will continue to suffer until judgment is entered and Kosmann is removed from the Subject Property;

5. For pre-judgment interest calculated at the rate provided by law;

6. For entry of an order and judgment awarding to Gilbride costs incurred herein;

7. For the entry of an order and judgment awarding to Gilbride attorney fees incurred herein in an amount of \$2,500 if this matter is uncontested and a greater amount if this matter is contested; and

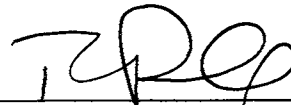
8. For such other and further relief as this Court deems just and equitable.

Demand for Jury Trial

Pursuant to I.R.C.P. 38, Gilbride hereby respectfully demands a jury trial of twelve people on all issues raised in this Counterclaim and triable of right by jury.

DATED this 19th day of February, 2013

HAMILTON, MICHAELSON & HILTY, LLP



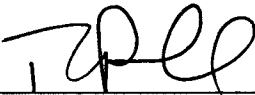
RON R. SHEPHERD
Attorneys for Defendant/Counterclaimant

CERTIFICATE OF DELIVERY

I hereby certify that on the 19th day of February, 2013 I caused a true and correct copy of the foregoing ANSWER, COUNTERCLAIM AND DEMAND FOR JURY TRIAL to be served by the method indicated below, and addressed to the following:

Kevin E. Dinius
Michael J. Hanby, II
DINIUS LAW
5680 East Franklin Road, Suite 130
Nampa, ID 83687

() U.S. Mail, Postage Prepaid
() Certified Mail/Return Receipt
() Hand Delivered
(☒) Facsimile 475-0101
(☒) Email: *kdinius@diniuslaw.com*
mhanby@diniuslaw.com



RON R. SHEPHERD

Order Number: 12213146 *HE/NH*

Warranty Deed

For value received,

David A. Kosmann and Maria Ann Kosmann, husband and wife

the grantor, does hereby grant, bargain, sell, and convey unto

Leo Joseph Gilbride a single man

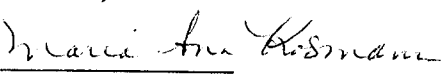
whose current address is 11946 Bonnie Lane Nampa, ID 83651

the grantee, the following described premises, in Canyon County, Idaho, to wit:

Lot 6 in Block 1 of Dunn's Plat, according to the official plat thereof, filed in Book 14 of Plats at Page(s) 35, official records of Canyon County, Idaho.

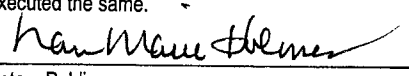
To have and to hold the said premises, with their appurtenances unto the said Grantee, its heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that Grantor is the owner in fee simple of said premises; that they are free from all encumbrances except those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee; and subject to all existing patent reservations, easements, right(s) of way, protective covenants, zoning ordinances, and applicable building codes, laws and regulations, general taxes and assessments, including irrigation and utility assessments (if any) for the current year, which are not due and payable, and that Grantor will warrant and defend the same from all lawful claims whatsoever. Whenever the context so requires, the singular number includes the plural.


David A. Kosmann


Maria Ann Kosmann

State of Idaho, County of Ada ss.

On this 24th day of December in the year of 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared David A. Kosmann and Maria Ann Kosmann, known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.


Notary Public
My Commission Expires: 08/14/14
(seal)

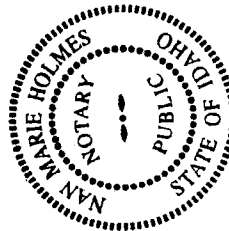


EXHIBIT "A"

JULY 2012 EDITION
Page 1 of 7

RE-21 REAL ESTATE PURCHASE AND SALE AGREEMENT

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

Idaho Association of REALTORS®
The Real Estate Professionals

1 ID# 3784895 DATE 7/14/11

2 LISTING AGENCY Marc Banner Office Phone # 208.841.7610 Fax # 208.286.4869

3 Listing Agent Justin McCarthy E-Mail JustinTimeRE@gmail.com Phone # _____

4 SELLING AGENCY Marc Banner Office Phone # 208.841.7610 Fax # 208.286.4869

5 Selling Agent Justin McCarthy E-Mail JustinTimeRE@gmail.com Phone # _____

6

7 **1. BUYER:** Leo Gilbride

8 (Hereinafter called "BUYER") agrees to purchase, and the undersigned SELLER agrees to sell the following described real estate hereinafter referred to as

9 "PROPERTY" COMMONLY KNOWN AS 1020 W Homedale Rd.

10 Caldwell City Canyon County, ID, Zip 83607 legally described as:

11 04-3N-3W SW DUNNS PLAT LOT 6 BLK 1

12 OR Legal Description Attached as addendum # _____ (Addendum must accompany original offer.)

13

14 **2. \$111,000.00 PURCHASE PRICE:** One Hundred Eleven Thousand and Zero/100 DOLLARS,

15 payable upon the following TERMS AND CONDITIONS (not including closing costs):

16

17 **3. FINANCIAL TERMS:** Note: A+C+D+E must add up to total purchase price.

18 (A) \$ 1,000.00 EARNEST MONEY: BUYER hereby deposits One Thousand and Zero/100

19 DOLLARS as Earnest Money evidenced by: ☐ cash ☐ personal check ☐ cashier's check ☐ note (due date)

20 ☒ other Promissory Note and a receipt is hereby acknowledged.

21 Earnest Money to be deposited in trust account ☐ upon receipt or ☐ upon acceptance by BUYER and SELLER or ☒ other Upon acceptance by

22 3rd party.

23 and shall be held by: ☒ Listing Broker ☐ Selling Broker ☐ other n/a for the benefit of the parties hereto.

24 THE RESPONSIBLE BROKER SHALL BE: Marc Banner

25

26 **(B). ALL CASH OFFER:** ☒ NO ☐ YES. If this is an all cash offer do not complete Sections 3C and 3D, fill blanks with "0" (ZERO). IF CASH

27 OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE SUBJECT TO ANY FINANCIAL CONTINGENCY. BUYER agrees to provide SELLER

28 within 5 business days (five [5] if left blank) from the date of acceptance of this agreement by all parties, evidence of sufficient funds and/or proceeds

29 necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement or contract(s) for

30 the sale of BUYER'S current residence or other property to be sold.

31

32 **(C). \$ 86,000.00 NEW LOAN PROCEEDS:** This Agreement is contingent upon BUYER obtaining the following financing:

33 ☒ FIRST LOAN of \$ 86,000.00 not including mortgage insurance, through ☒ FHA ☒ VA ☐ CONVENTIONAL ☒ INFA ☐ RURAL

34 DEVELOPMENT, ☐ OTHER n/a with interest not to exceed _____ % for a period of

35 30 year(s) at: ☒ Fixed Rate ☐ Other n/a In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated

36 financing, BUYER's Earnest Money may be returned at BUYER'S request, BUYER shall pay no more than 2 point(s) plus origination fee if any,

37 SELLER shall pay no more than 2 point(s). Any reduction in points shall first accrue to the benefit of the ☒ BUYER ☐ SELLER ☐ Divided Equally

38 ☐ N/A

39 ☐ SECOND LOAN of \$ _____ with interest not to exceed n/a % for a period of n/a year(s) at: ☐ Fixed Rate

40 ☐ Other n/a BUYER shall pay no more than n/a point(s) plus origination fee if any, SELLER shall pay no more than

41 n/a point(s). Any reduction in points shall first accrue to the benefit of the ☐ BUYER ☐ SELLER ☐ Divided Equally ☐ N/A

42 **LOAN APPLICATION:** BUYER ☐ has applied OR ☒ shall apply for such loan(s) within 10 business days (five [5] if left blank) of SELLER'S acceptance.

43 Within 15 business days (ten [10] if left blank) of final acceptance of all parties, BUYER agrees to furnish SELLER with a written confirmation

44 showing lender approval of credit report, income verification, debt ratios, and evidence of sufficient funds and/or proceeds necessary to

45 close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. If such

46 written confirmation is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying

47 BUYER(S) in writing of such cancellation within 3 business days (three [3] if left blank) after written confirmation was required. If SELLER does not

48 cancel within the strict time period specified as set forth herein, SELLER shall be deemed to have accepted such written confirmation of lender approval

49 and shall be deemed to have elected to proceed with the transaction; SELLER'S approval shall not be unreasonably withheld. If an appraisal is

50 required by lender, the PROPERTY must appraise at not less than purchase price or BUYER'S Earnest Money may be returned at BUYER'S

51 request. BUYER may also apply for a loan with different conditions and costs and close transaction provided all other terms and conditions of this

52 Agreement are fulfilled, and the new loan does not increase the costs or requirements to the SELLER. FHA / VA: If applicable, it is expressly agreed

53 that notwithstanding any other provisions of this contract, BUYER shall not be obligated to complete the purchase of the PROPERTY described herein or

54 to incur any penalty or forfeiture of Earnest Money deposits or otherwise unless BUYER has been given in accordance with HUD/FHA or VA

55 requirements a written statement by the Federal Housing Commissioner, Veterans Administration or a Direct Endorsement lender setting forth the

56 appraised value of the PROPERTY of not less than the sales price as stated in the contract.

57

58 **(D). \$ _____ ADDITIONAL FINANCIAL TERMS:**

59 ☐ Additional financial terms are specified under the heading "OTHER TERMS AND/OR CONDITIONS" (Section 4).

60 ☐ Additional financial terms are contained in a FINANCING ADDENDUM of same date, attached hereto, signed by both parties.

61

62 **(E). \$ 24,000.00 APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING (Not including closing costs):** Cash at

63 closing to be paid by BUYER at closing in GOOD FUNDS, includes: cash, electronic transfer funds, certified check or cashier's check. NOTE: If

64 any of above loans being Assumed or taken "subject to", any net differences between the approximate balances and the actual balance of said loan(s)

65 shall be adjusted at closing of escrow in: ☒ Cash ☐ Other n/a

66

BUYER'S Initials JA Date 18 SEPT 12

SELLER'S Initials PK MK Date 9-24-12

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JULY 2012 EDITION

RE-21 REAL ESTATE PURCHASE AND SALE AGREEMENT

Page 1 of 7

EXHIBIT "B"

PROPERTY ADDRESS:

1020 W Homedale Rd.

Caldwell

ID#:

3784895

4. OTHER TERMS AND/OR CONDITIONS: This Agreement is made subject to the following special terms, considerations and/or contingencies which must be satisfied prior to closing Offer is contingent upon 3rd party bank (GMAC) releasing the mortgage as paid in full, and

releasing rights to pursuit of a deficiency judgement.

Seller will rent the property back from the buyer for a term of not less than 1 year.

5. ITEMS INCLUDED & EXCLUDED IN THIS SALE: All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED in THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than \$100.

(A). ADDITIONAL ITEMS SPECIFICALLY INCLUDED IN THIS SALE: n/a

(B). ITEMS SPECIFICALLY EXCLUDED IN THIS SALE: private property

6. MINERAL RIGHTS: Any and all mineral rights appurtenant to the PROPERTY are included in and are part of the sale of this PROPERTY unless otherwise agreed to by the parties in writing.

7. WATER RIGHTS: Any and all water rights including but not limited to water systems, wells, springs, lakes, streams, ponds, rivers, ditches, ditch rights, and the like, if any, appurtenant to the PROPERTY are included in and are a part of the sale of this PROPERTY unless otherwise agreed to by the parties in writing.

8. TITLE CONVEYANCE: Title of SELLER is to be conveyed by warranty deed, unless otherwise provided, and is to be marketable and insurable except for rights reserved in federal patents, state or railroad deeds, building or use restrictions, building and zoning regulations and ordinances of any governmental unit, and rights of way and easements established or of record. Liens, encumbrances or defects to be discharged by SELLER may be paid out of purchase money at date of closing. No liens, encumbrances or defects which are to be discharged or assumed by BUYER or to which title is taken subject to, exist unless otherwise specified in this Agreement.

9. TITLE INSURANCE: There may be types of title insurance coverages available other than those listed below and parties to this agreement are advised to talk to a title company about any other coverages available that will give the BUYER additional coverage.

(A). PRELIMINARY TITLE COMMITMENT: Prior to closing the transaction, ☒ SELLER or ☐ BUYER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said PROPERTY. BUYER shall have 5 business days (five [5] if left blank) from receipt of the preliminary commitment or not fewer than twenty-four (24) hours prior to closing, within which to object in writing to the condition of the title as set forth in the preliminary commitment. If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title. It is agreed that if the title of said PROPERTY is not marketable, or cannot be made so within 5 business days (five [5] if left blank) after notice containing a written statement of defect is delivered to SELLER, BUYER'S Earnest Money deposit will be returned to BUYER and SELLER shall pay for the cost of title insurance cancellation fee, escrow and legal fees, if any.

(B). TITLE COMPANY: The parties agree that Nan Holmes at Title One Corp. Title Company located at 1101 W River St. #201 Boise, ID 83702 shall provide the title policy and preliminary report of commitment.

(C). STANDARD COVERAGE OWNER'S POLICY: SELLER shall within a reasonable time after closing furnish to BUYER a title insurance policy in the amount of the purchase price of the PROPERTY showing marketable and insurable title subject to the liens, encumbrances and defects elsewhere set out in this Agreement to be discharged or assumed by BUYER unless otherwise provided herein. The risk assumed by the title company in the standard coverage policy is limited to matters of public record. BUYER shall receive a ILTA/ALTA Owner's Policy of Title Insurance. A title company, at BUYER's request, can provide information about the availability, desirability, coverage and cost of various title insurance coverages and endorsements; if BUYER desires title coverage other than that required by this paragraph, BUYER shall instruct Closing Agency in writing and pay any increase in cost unless otherwise provided herein.

(D). EXTENDED COVERAGE LENDER'S POLICY (Mortgagee policy): The lender may require that BUYER (Borrower) furnish an Extended Coverage Lender's Policy. This extended coverage lender's policy considers matters of public record and additionally insures against certain matters not shown in the public record. This extended coverage lender's policy is solely for the benefit of the lender and only protects the lender.

BUYER'S Initials

Date 18 SEPT 12

SELLER'S Initials

Date 9-24-12

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PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID#: 3784895

10. INSPECTION:

(A). BUYER chooses ☒ to have inspection ☐ not to have inspection. If BUYER chooses not to have inspection, skip Section 10C. BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense. BUYER shall, within 10 business days (ten [10] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection. BUYER is strongly advised to exercise these rights and to make BUYER'S own selection of professionals with appropriate qualifications to conduct inspections of the entire PROPERTY. SELLER shall make PROPERTY available for inspection and agrees to accept the responsibility and expense for making sure all the utilities are turned on for the inspection except for phone and cable. Some inspections, investigations, tests, surveys and other studies may require additional days to complete. The parties agree that unless specifically set forth below, the above timeframe for investigations, tests, surveys and other studies shall govern.

Additional inspections/timeframes: n/a

(B). FHA INSPECTION REQUIREMENT, if applicable: "For Your Protection: Get a Home Inspection", HUD 92564-CN must be signed on or before execution of this agreement.

(C). SATISFACTION/REMOVAL OF INSPECTION CONTINGENCIES:

1). If BUYER does not within the strict time period specified give to SELLER written notice of disapproved items or written notice of termination of this Agreement, BUYER shall conclusively be deemed to have: (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

2). If BUYER does within the strict time period specified give to SELLER written notice of termination of this Agreement based on an unsatisfactory inspection, the parties will have no obligation to continue with the transaction and the Earnest Money shall be returned to BUYER.

3). If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall provide to SELLER pertinent section(s) of written inspection reports. SELLER shall have 3 business days (three [3] if left blank) in which to respond in writing. SELLER, at SELLER's option, may correct the items as specified by BUYER in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within 5 business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with the transaction and proceed to closing. This will remove BUYER'S inspection contingency.

4). If both parties do not come to a consensus as to the disapproved items to be corrected by SELLER within the strict time period specified, or SELLER does not respond in writing within the strict time period specified, then the BUYER has the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice within 3 business days (three [3] if left blank) that they will not continue with the transaction and will receive their Earnest Money back.

5). If BUYER does not give such written notice of cancellation within the strict time periods specified, BUYER shall conclusively be deemed to have elected to proceed with the transaction without repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct. SELLER shall make the PROPERTY available for all inspections. BUYER shall keep the PROPERTY free and clear of liens, indemnify and hold SELLER harmless from all liability, claims, demands, damages and costs; and repair any damages arising from the inspections. No inspections may be made by any governmental building or zoning inspector or government employee without the prior consent of SELLER unless required by local law.

11. LEAD PAINT DISCLOSURE: The subject PROPERTY ☒ is ☐ is not defined as "Target Housing" regarding lead-based paint or lead-based paint hazards. The term lead-based paint hazards is intended to identify lead-based paint and all residual lead-containing dusts and soils regardless of the source of the lead. If yes, BUYER hereby acknowledges the following: (a) BUYER has been provided an EPA approved lead-based paint hazard information pamphlet, "Protect Your Family From Lead in Your Home", (b) receipt of SELLER'S Disclosure of Information and Acknowledgment Form and have been provided with all records, test reports or other information, if any, related to the presence of lead-based paint hazards on said PROPERTY, (c) that this contract is contingent upon BUYER'S right to have the PROPERTY tested for lead-based paint hazards to be completed no later than n/a or the contingency will terminate, (d) that BUYER hereby ☒ waives ☐ does not waive this right, (e) that if test results show unacceptable amounts of lead-based paint on the PROPERTY, BUYER has the right to cancel the contract subject to the option of the SELLER (to be given in writing) to elect to remove the lead-based paint and correct the problem which must be accomplished before closing, (f) that if the contract is canceled under this clause, BUYER'S earnest money deposit will be returned to BUYER. Additionally, if any structure was built before 1978 and is a residential home, apartment or child-occupied facility such as a school or day-care center, federal law requires contractors that disturb lead-based paint in that structure to provide the owner with a "Renovate Right" pamphlet. The contractor shall be certified and follow specific work practices to prevent lead contamination.

12. MOLD DISCLAIMER: BUYER is hereby advised that mold and/or other microorganisms may exist at the Property. Upon closing BUYER acknowledges and agrees to accept full responsibility and risk for any matters that may result from mold and/or other microorganisms and to hold SELLER and any Broker or agent representing SELLER or BUYER harmless from any liability or damages (financial or otherwise) relating to such matters.

BUYER'S Initials JA Date 19 SEPT 12

SELLER'S Initials JK MK Date 9-24-12

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PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID#: 3784895

13. SQUARE FOOTAGE VERIFICATION: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY OR IMPROVEMENTS IS APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD.

14. SELLER'S PROPERTY CONDITION DISCLOSURE FORM: If required by Title 55, Chapter 25 Idaho Code SELLER shall within ten (10) calendar days after execution of this Agreement provide to BUYER or BUYER'S agent, "Seller's Property Condition Disclosure Form" or other acceptable form. BUYER has received the "Seller's Property Condition Disclosure Form" or other acceptable form prior to signing this Agreement: ☐ Yes ☒ No ☐ N/A

15. COVENANTS, CONDITIONS AND RESTRICTIONS (CC&Rs): As part of the BUYER'S inspection of the PROPERTY as set forth in Section 10, BUYER is responsible for obtaining and reviewing a copy of any CC&Rs which may affect the PROPERTY. BUYER shall have 10 business days (ten [10] if left blank) (but in no event shall such time period exceed that time period set forth for inspections in Section 10) to review and approve of any such CC&Rs that may affect the PROPERTY. Unless BUYER delivers to SELLER a written and signed objection to the terms of any applicable CC&Rs with particularity describing BUYER's reasonable objections within such time period as set forth above, BUYER shall be deemed to have conclusively waived any objection to the terms of any CC&Rs affecting the PROPERTY.

16. SUBDIVISION HOMEOWNER'S ASSOCIATION: BUYER is aware that membership in a Home Owner's Association may be required and BUYER agrees to abide by the Articles of Incorporation, Bylaws and rules and regulations of the Association. BUYER is further aware that the PROPERTY may be subject to assessments levied by the Association described in full in the Declaration of Covenants, Conditions and Restrictions. BUYER has reviewed Homeowner's Association Documents: ☐ Yes ☐ No ☒ N/A. Association fees/dues are \$ n/a per n/a.
☐ BUYER ☐ SELLER ☒ N/A to pay Homeowner's Association SET UP FEE of \$ n/a and/or PROPERTY TRANSFER FEES of \$ n/a at closing.

17. COSTS PAID BY: The parties agree to pay the following costs as indicated below. None of the costs to be paid by the parties in this section creates an inspection or performance obligation other than strictly for the payment of costs. There may be other costs incurred in addition to those set forth below. Such costs may be required by the lender, by law, or by other such circumstances.

SELLER agrees to pay up to \$ 10,000 (\$0 if left blank) of lender required repair costs only.
BUYER or SELLER has the option to pay any lender required repair costs in excess of this amount.

Upon closing SELLER agrees to pay up to EITHER n/a % (N/A if left blank) of the purchase price OR \$ n/a (N/A if left blank) of lender-approved BUYER'S closing costs, lender fees, and prepaid costs which includes but is not limited to those items in BUYER columns marked below.

	BUYER	SELLER	Shared Equally	N/A		BUYER	SELLER	Shared Equally	N/A
Appraisal Fee		X			Title Ins. Standard Coverage Owner's Policy		X		
Appraisal Re-inspection Fee		X			Title Ins. Extended Coverage Lender's Policy - Mortgagee Policy		X		
Closing Escrow Fee		X			Additional Title Coverage				X
Lender Document Preparation Fee		X			Fuel in Tank - Dollar Amount to be Determined by Supplier				X
Tax Service Fee		X			Domestic Well Water Potability Test				X
Flood Certification/Tracking Fee		X			Domestic Well Water Productivity Test				X
Lender Required Inspections		X			Septic Inspections		X		
Attorney Contract Preparation or Review Fee		X			Septic Pumping		X		
Home Warranty Plan				X	Survey		X		

18. OCCUPANCY: BUYER ☐ does ☒ does not intend to occupy PROPERTY as BUYER'S primary residence.

19. RISK OF LOSS OR NEGLECT: Prior to closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire, neglect, or other destructive cause prior to closing, this agreement shall be voidable at the option of the BUYER.

BUYER'S Initials JA Date 18 SEPT 12

SELLER'S Initials [Signature] Date 9-24-12

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PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID#: 3784895

242. **20. FINAL WALK THROUGH:** The SELLER grants BUYER and any representative of BUYER reasonable access to conduct a final walk through
243. inspection of the PROPERTY approximately 3 calendar days (three [3] if left blank) prior to close of escrow, NOT AS A CONTINGENCY OF THE
244. SALE, but for purposes of satisfying BUYER that any repairs agreed to in writing by BUYER and SELLER have been completed and PROPERTY are in
245. substantially the same condition as on the date this offer is made. SELLER shall make PROPERTY available for the final walk through and agree to accept
246. the responsibility and expense for making sure all the utilities are turned on for the walk through except for phone and cable. If BUYER does not conduct a
247. final walk through, BUYER specifically releases the SELLER and Broker(s) of any liability.

248. **21. SINGULAR AND PLURAL** terms each include the other, when appropriate.

249. **22. FORECLOSURE NOTICE:** If the PROPERTY described above is currently involved in a foreclosure proceeding (pursuant to Idaho Code §45-1508)
250. any contract or agreement with the owner or owners of record that involves the transfer of any interest in residential real property, as defined in §45-
251. 525(5)(b), Idaho Code, subject to foreclosure must be in writing, and must be accompanied by and affixed to RE-42, Property Foreclosure Disclosure Form.

252. **23. MECHANIC'S LIENS - GENERAL CONTRACTOR DISCLOSURE STATEMENT NOTICE:** BUYER and SELLER are hereby notified that,
253. subject to Idaho Code §48-526 et seq., a "General Contractor" must provide a Disclosure Statement to a homeowner that describes certain rights afforded to
254. the homeowner (e.g. lien waivers, general liability insurance, extended policies of title insurance, surety bonds, and sub-contractor information). The
255. Disclosure Statement must be given to a homeowner prior to the General Contractor entering into any contract in an amount exceeding \$2,000 with a
256. homeowner for construction, alteration, repair, or other improvements to real property, or with a residential real property purchaser for the purchase and sale
257. of newly constructed property. Such disclosure is the responsibility of the General Contractor and it is not the duty of your agent to obtain this information on
258. your behalf. You are advised to consult with any General Contractor subject to Idaho Code §48-526 et seq. regarding the General Contractor Disclosure
259. Statement.

260. **24. SALES PRICE INFORMATION:** Pursuant to Idaho Code §54-2083(6)(d), a "sold" price of real property is not confidential client information.

261. **25. TRANSMISSION OF DOCUMENTS:** Facsimile or electronic transmission of any signed original document, and retransmission of any signed
262. facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the
263. Closing Agency, the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.

264. **26. BUSINESS DAYS:** A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real
265. PROPERTY is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized
266. by the state of Idaho as found in Idaho Code §73-108. The time in which any act required under this agreement is to be performed shall be computed by
267. excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal holiday, then the
268. time for performance shall be the next subsequent business day.

269. **27. CALENDAR DAYS:** A calendar day is herein defined as Monday through Sunday, midnight to midnight, in the local time zone where the subject real
270. PROPERTY is physically located. A calendar day shall include any legal holiday. The time in which any act required under this agreement is to be performed
271. shall be computed by excluding the date of execution and including the last day, thus the first day shall be the day after the date of execution. Any reference
272. to "day" or "days" in this agreement means the same as calendar day, unless specifically enumerated as a "business day."

273. **28. ATTORNEY'S FEES:** If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this
274. Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees
275. on appeal.

276. **29. DEFAULT:** If BUYER defaults in the performance of this Agreement, SELLER has the option of (1) accepting the Earnest Money as liquidated
277. damages or (2) pursuing any other lawful right and/or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make
278. demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER'S Broker
279. on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of title insurance, escrow fees, appraisal, credit report
280. fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER'S
281. Broker, provided that the amount to be paid to SELLER'S Broker shall not exceed the Broker's agreed-to commission. SELLER and BUYER specifically
282. acknowledge and agree that if SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER'S sole and exclusive remedy, and
283. such shall not be considered a penalty or forfeiture. If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs
284. incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title
285. insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees; with any balance of the Earnest Money to be held pending
286. resolution of the matter. If SELLER defaults, having approved said sale and fails to consummate the same as herein agreed, BUYER'S Earnest Money
287. deposit shall be returned to him/her and SELLER shall pay for the costs of title insurance, escrow fees, appraisals, credit report fees, inspection fees,
288. brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be
289. entitled.

290. **30. EARNEST MONEY DISPUTE / INTERPLEADER:** Notwithstanding any termination or breach of this Agreement, BUYER and SELLER agree that
291. in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, Broker may reasonably rely on the terms
292. of this Agreement or other written documents signed by both parties to determine how to disburse the disputed money. However, Broker or closing agency
293. shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties
294. and deposit any moneys or things of value into a court of competent jurisdiction and shall recover all costs which were incurred as a result of the dispute
295. including, but not limited to, reasonable attorney's fees.

296. **31. COUNTERPARTS:** This Agreement may be executed in counterparts. Executing an agreement in counterparts shall mean the signature of two
297. identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies
298. shall together constitute one and the same instrument.

BUYER'S Initials (Signature) Date 18 SEPT 12

SELLER'S Initials (Signature) NK Date 9-24-12

PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID# 3784895

32. "NOT APPLICABLE" DEFINED: The letters "n/a," "N/A," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.

33. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

34. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).

Section 1:

- ☐ A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).
☒ B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.
☐ C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).
☐ D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

Section 2:

- ☐ A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).
☒ B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.
☐ C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).
☐ D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party confirms that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

35. CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing agency all funds and instruments necessary to complete this transaction. Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER. The closing shall be no later than (Date) 12/31/12.

The parties agree that the CLOSING AGENCY for this transaction shall be Nan Holmes at Title One Corp located at 1101 River St. #201, Boise, ID 83702.

If a long-term escrow / collection is involved, then the long-term escrow holder shall be n/a.

36. POSSESSION: BUYER shall be entitled to possession ☒ upon closing or ☐ date n/a time n/a ☐ A.M. ☐ P.M. Property taxes and water assessments (using the last available assessment as a basis), rents, interest and reserves, liens, encumbrances or obligations assumed, fuel in fuel tank, and utilities shall be prorated as of closing.

37. ASSIGNMENT: This Agreement and any rights or interests created herein ☒ may ☐ may not be sold, transferred, or otherwise assigned.

38. ENTIRE AGREEMENT: This Agreement contains the entire Agreement of the parties respecting the matters herein set forth and supersedes all prior Agreements between the parties respecting such matters. No warranties, including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party.

39. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

40. AUTHORITY OF SIGNATORY: If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.

41. ACCEPTANCE: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) 9/24/12 at (Local Time in which PROPERTY is located) 5 ☐ A.M. ☒ P.M. If acceptance of this offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within 3 calendar days (three [3] if left blank) by BUYER initialing HERE. If BUYER timely approves of SELLER's late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER.

BUYER'S Initials JA Date 18 SEPT 12

SELLER'S Initials SK (ML) Date 9-24-12

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PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID#: 3784885

42. BUYER'S SIGNATURES:

☐ SEE ATTACHED BUYER'S ADDENDUM(S): _____ (Specify number of BUYER addendum(s) attached.)

BUYER ☐ does ☐ does not currently hold an active Idaho real estate license.

BUYER Signature Leo Gilbride

BUYER (Print Name) Leo Gilbride

Date 9-25-12 Time 10:00 ☒ A.M. ☐ P.M.

Phone # 208.250.7439 Cell # _____

Address 11946 Bonnie Ln.

City Nampa State ID Zip 83651

E-Mail propietor4@yahoo.com

Fax # _____

BUYER ☐ does ☐ does not currently hold an active Idaho real estate license.

BUYER Signature _____

BUYER (Print Name) _____

Date _____ Time _____ ☐ A.M. ☐ P.M.

Phone # _____ Cell # _____

Address _____

City _____ State _____ Zip _____

E-Mail _____

Fax # _____

43. SELLER'S SIGNATURES: On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof on the part of the SELLER.

☐ SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER

☐ SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) # _____

SELLER ☐ does ☒ does not currently hold an active Idaho real estate license.

SELLER Signature David A. Kosmann

SELLER (Print Name) David A. Kosmann

Date 9-24-12 Time 10:00 ☒ A.M. ☐ P.M.

Phone # _____ Cell # 208.250.9755

Address 1020 W Homedale Rd.

City Caldwell State ID Zip 83607

E-Mail _____

Fax # _____

CONTRACTOR REGISTRATION # (if applicable) _____

SELLER ☐ does ☒ does not currently hold an active Idaho real estate license.

SELLER Signature Maria Kosmann

SELLER (Print Name) Maria Kosmann

Date 9-24-12 Time 10:30 ☒ A.M. ☐ P.M.

Phone # _____ Cell # (208) 250-4955

Address 1307 W. Hawk Ct.

City NAMPA State ID Zip 83651

E-Mail loveiskind11@gmail.com

Fax # _____

CONTRACTOR REGISTRATION # (if applicable) _____

ADDENDUM # 1 (All addendums shall be numbered sequentially.)
JULY 2012 EDITION Page 1 of 1
RE-11 ADDENDUM
Idaho Association of REALTORS® THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

Date: 9-24-12

This is an ADDENDUM to the ☒ Purchase and Sale Agreement ☐ Other
("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 9/14/12 ID # 3784895

ADDRESS: 1020 W Homedale Rd., Caldwell, ID 83607

BUYER(S): Leo Gilbride

SELLER(S): David A. Kosmann and Maria A. Kosmann

The undersigned parties hereby agree as follows:
Seller and Buyer each represent that the sale is an "Arm's Length" transaction and the seller and buyer are unrelated to each other by family, marriage or commercial enterprise.

The Buyer agrees not to sell the property within 90 days of closing of the sale.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: [Signature] Date: 02 OCT 12

BUYER: _____ Date: _____

SELLER: [Signature] Date: 24 SEP 2012

SELLER: [Signature] Date: 24 SEP 2012

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JULY 2012 EDITION

RE-11 ADDENDUM

Page 1 of 1

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ADDENDUM #

2

(All addendums shall be numbered sequentially.)

JULY 2012 EDITION

Page 1 of 1

RE-11 ADDENDUM

Idaho Association of REALTORS®
The Way to Real Estate SuccessTHIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

Date: 10/22/2012

This is an ADDENDUM to the ☒ Purchase and Sale Agreement ☐ Other n/a
 ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 9/14/12 ID # 3784895

ADDRESS: 1020 W Homedale Rd., Caldwell, ID 83607

BUYER(S): Leo Gilbride

SELLER(S): David A. Kosmann and Maria A. Kosmann

The undersigned parties hereby agree as follows:

Adjust purchase price to \$117,500.00

*****END*****

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: [Signature] Date: 26 OCT 12

BUYER: Date:

SELLER: [Signature] Date: 26 OCT 12

SELLER: [Signature] Date: 26 OCT 2012

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JULY 2012 EDITION

RE-11 ADDENDUM

Page 1 of 1

FILED
A.M. P.M.

MAR 12 2013

CANYON COUNTY CLERK
K CANNON, DEPUTY

Kevin E. Dinius
 Michael J. Hanby II
 DINIUS LAW
 5680 E. Franklin Rd., Suite 130
 Nampa, Idaho 83687
 Telephone: (208) 475-0100
 Facsimile: (208) 475-0101
 ISB Nos. 5974, 7997
 kdinius@diniuslaw.com
 mhanby@diniuslaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,

Plaintiff,

-vs-

LEO GILBRIDE,

Defendant.

CASE NO. CV13-795C

ANSWER TO COUNTERCLAIM

COMES NOW, Plaintiff David Kosmann by and through his undersigned attorneys of record, and for answer to Defendant's Counterclaim, admits, denies and alleges as follows:

FIRST DEFENSE

Defendant's Counterclaim fails to state a cause of action against Plaintiff on which relief may be granted.

ANSWER TO COUNTERCLAIM - 1

SECOND DEFENSE

Plaintiff denies each and every allegation contained in Defendant's Counterclaim not specifically admitted herein.

THIRD DEFENSE**PARTIES**

1. Plaintiff admits the allegation contained in Paragraph 13 of Defendant's Counterclaim.

2. Plaintiff admits the allegation contained in Paragraph 14 of Defendant's Counterclaim.

JURISDICTION AND VENUE

3. Plaintiff admits the allegations contained in Paragraph 15 of Defendant's Counterclaim.

GENERAL ALLEGATIONS

4. In answer to Paragraph 16 of Defendant's Counterclaim, Plaintiff admits only that Defendant agreed to purchase the property located at 1020 W. Homedale Road, Caldwell, Idaho 83607 through a short-sale with GMAC Mortgage in an effort to avoid foreclosure.

5. In answer to Paragraph 17 of Defendant's Counterclaim, Plaintiff admits only that Defendant agreed to purchase the property located at 1020 W. Homedale Road, Caldwell, Idaho 83607 through a short-sale with GMAC Mortgage in an effort to avoid foreclosure.

6. In answer to Paragraph 18 of Defendant's Counterclaim, Plaintiff admits only the parties agreed that Plaintiff would provide Defendant more than \$31,000.00 so that Defendant would have sufficient funds to close on the property. Plaintiff provided more than \$31,000 to Gilbride as agreed and the sale of the Property closed on December 28, 2012.

ANSWER TO COUNTERCLAIM - 2

7. Plaintiff admits the allegation contained in Paragraph 19 of Defendant's Counterclaim.

8. In answer to Paragraph 20 of Defendant's Counterclaim, Plaintiff admits only that the parties agreed that Plaintiff would pay the monthly payments for several months, until such time the loan was paid off, at which time, Defendant would convey the Property back to Plaintiff. Until that time, it was agreed that Plaintiff would continue to live at the Property as a tenant.

9. Plaintiff denies the allegations contained in Paragraph 21 of Defendant's Counterclaim.

10. Plaintiff denies the allegation contained in Paragraph 22 of Defendant's Counterclaim.

INCORPORATION BY REFERENCE

11. Plaintiff realleges and incorporates the preceding paragraphs of this Answer to Counterclaim as if they were fully set forth herein.

COUNT 1 (Breach of Contract)

12. Plaintiff admits the allegation contained in Paragraph 24 of Defendant's Counterclaim.

13. Plaintiff admits the allegation contained in Paragraph 25 of Defendant's Counterclaim.

14. Plaintiff denies the allegations contained in Paragraph 26 of Defendant's Counterclaim.

15. Plaintiff denies the allegations contained in Paragraph 27 of Defendant's Counterclaim.

ANSWER TO COUNTERCLAIM - 3

COUNT II**(Ejectment)**

16. Plaintiff denies the allegations contained in Paragraph 28 of Defendant's Counterclaim.

17. Plaintiff denies the allegations contained in Paragraph 29 of Defendant's Counterclaim.

18. Plaintiff denies the allegations contained in Paragraph 30 of Defendant's Counterclaim.

COSTS AND ATTORNEY FEES

19. Plaintiff denies the allegations contained in Paragraph 31 of Defendant's Counterclaim.

PRAYER FOR RELIEF

In response to the prayer contained on Page 5 and 6 of Defendant's Counterclaim and to the extent that Defendant's prayer attempts to allege facts or state claims for relief against Plaintiff, Plaintiff denies the contents of the prayer in its entirety.

PLAINTIFF'S DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury composed of no less than twelve (12) persons on all issues so triable, pursuant to Idaho Rule of Civil Procedure 38(b).

WHEREFORE, Plaintiff prays for Judgment, Order and Decree as follows:


1. For money damages from the Defendant, that fully and fairly compensate Plaintiff for Defendant's for breach and other causes of action above in a sum to be determined at trial in excess of \$10,000.00;

2. For an award of Plaintiff's reasonable attorney fees incurred in pursuing this action, pursuant to Idaho Code §§ 12-120(1), 12-121 and I.R.C.P. 54;

3. For costs of suit incurred herein; and,
4. For such other and further relief as to the Court is just and equitable.
20. For such other and further relief as the Court deems just and proper.

Dated this 11th day of March, 2013.

DINIUS LAW

By: 
Kevin E. Dinius
Michael J. Hanby II
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 11th day of March, 2013, a true and correct copy of the above and foregoing document was served upon the following by:

Ronald R. Shepherd
HAMILTON MICHAELSON & HILTY, LLP
1303 12th Ave Rd
PO Box 65
Nampa, ID 83653-0065

☐
☐
☐
☒

US Mail
Overnight Mail
Hand Delivery
Facsimile - No. 467-3058


for DINIUS LAW

dd/T:\Clients\K\Kosmann, Dave 24856\Non-Discovery\Answer to Counterclaim.docx

ANSWER TO COUNTERCLAIM - 5

F I L L E D
A.M. 4:55 P.M.

AUG 14 2013

**CANYON COUNTY CLERK
S. BYE, DEPUTY**

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101
ISB Nos. 5974, 7997
kdinius@diniuslaw.com
mhanby@diniuslaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,

Plaintiff,

-vs-

LEO GILBRIDE,

Defendant.

CASE NO. CV13-795C

FIRST AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL

COMES NOW, Plaintiff DAVID KOSMANN, by and through his attorneys of record, the law firm of Dinius & Associates, PLLC, for and against the above-named Defendant, LEO GILBRIDE, COMPLAINS and ALLEGES as follows:

PARTIES, JURISDICTION AND VENUE

1. At all times herein mentioned, Plaintiff DAVID KOSMANN (hereinafter, "Kosmann") was a resident of Canyon County, Idaho.

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - I

2. At all times relevant herein, Defendant LEO GILBRIDE (hereinafter, "Gilbride") was a resident of Canyon County, Idaho.

3. All of the acts complained of herein occurred in Canyon County, Idaho, making jurisdiction proper in this court.

4. Venue is proper pursuant to Idaho Code § 5-404.

GENERAL ALLEGATIONS

5. This case involves the following property: Lot 6, Block 1 of DUNN'S PLAT, Canyon County, Idaho, according to the official plat thereof, filed in Book 14 of Plats at Page 35, records of said County, commonly known as 1020 W. Homedale Road, Caldwell, Idaho 83607.

6. Kosmann was the owner of the Property when he fell behind on the mortgage payments.

7. In an effort to avoid foreclosure, Gilbride agreed to purchase the Property through a short-sale with GMAC Mortgage.

8. It was agreed that Kosmann would pay Gilbride more than \$31,000 so that Gilbride would have sufficient funds to close on the property.

9. Additionally, it was agreed that Kosmann would pay the monthly payments for several months, until such time the loan was paid off, at which time, Gilbride would convey the Property back to Kosmann.

10. Until that time, it was agreed that Kosmann could continue to live at the Property as a tenant.

11. Kosmann provided more than \$31,000 to Gilbride as agreed and the sale of the Property closed on December 28, 2012.

12. The parties were jointly represented by real estate agent Justin McCarthy of Realty Management Associates, Inc. in the transaction.

13. Mr. McCarthy was aware of the agreement between Kosmann and Gilbride, as described above.

14. Despite the parties' agreement, and despite the fact that Gilbride was paid more than \$31,000 to effectuate the parties' contract, Gilbride posted an 'eviction' notice to Kosmann less than two weeks after the closing.

15. Further, upon information and belief, Gilbride is already attempting to re-finance the property.

16. These actions affirmatively demonstrate that Gilbride does not intend to honor the agreement and has material breached that agreement.

COUNT I
Breach of Contract

17. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

18. The agreement for Gilbride to transfer the Property back to Kosmann, as described above, constitutes a binding contract.

19. The more than \$31,000 paid to Gilbride by Kosmann is evidence both of consideration and partial performance of the contract.

20. The refusal of Gilbride to honor the terms of the contract, as described above, constitutes a material breach of the contract.

21. As a result of Defendant Gilbride's breach, Kosmann has been damaged in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

COUNT II
Specific Performance

22. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

23. Gilbride has failed to abide by the terms of the agreement by attempting to evict Kosmann from the Property and refusing to transfer the Property back to Kosmann as agreed.

24. Kosmann has complied with all the terms and conditions to be performed by him under the agreement and is ready, willing, and able to perform any remaining terms and conditions of the agreement.

25. As a result of Defendant Gilbride's breach, Kosmann has been damaged in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

COUNT III

Breach of the Implied Covenant of Good Faith and Fair Dealing

26. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

27. Gilbride had a duty, pursuant to the agreement, to act in good faith and deal fairly with Kosmann.

28. Gilbride's failure to abide by the terms of the agreement, as described above, breached Gilbride's duty of good faith and fair dealing inherent in the agreement between the parties.

29. As a result of Defendant Gilbride's breach, Kosmann has been damaged in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

COUNT IV

Unjust Enrichment

30. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

31. Kosmann conferred a benefit upon Gilbride by providing the funds necessary to close the transaction and in agreeing to transfer the Property, with the expectation that it would be transferred back.

32. Gilbride was aware of and appreciated the benefits conferred upon him by Kosmann.

33. It is inequitable for Gilbride to retain the benefits described above without compensating Kosmann.

34. As a result of Gilbride's failure to abide by the terms of the agreement, Gilbride has been unjustly enriched in an amount to be proven with specificity at trial, but in an amount greater than \$10,000.

COUNT V
Fraud

35. Plaintiff realleges and incorporates the preceding paragraphs of this Complaint as if they were fully set forth herein.

36. Defendant made false and material representations to Plaintiff, falsely representing that he would assist Plaintiff in saving his home from foreclosure.

37. Defendant represented to Plaintiff that he would obtain financing to purchase Plaintiff's home and would transfer the property back to Plaintiff once Plaintiff could either pay off Defendant's loan or obtain other means to establish credit.

38. Defendant accepted approximately \$31,000 from Plaintiff to cover the closing costs as well as the down payment for the loan.

39. Plaintiff agreed to make the monthly mortgage payments and insurance costs.

40. Additionally, Plaintiff would remain in possession of the subject property, live there, and continue to operate his business.

41. Plaintiff was to pay Defendant roughly \$200 monthly above and beyond the mortgage and insurance costs to compensate Defendant for his time and effort.

42. Defendant had knowledge of the falsity of his representations.

43. Defendant intended Plaintiff rely and act upon his representations.

44. Plaintiff was ignorant of the falsity and/or had no way of knowing that Defendant's representations were false.

45. Plaintiff reasonably relied upon the representations of Defendant that he would abide by the terms of the agreement as set forth above.

46. Plaintiff was injured and suffered damages by the false and material representations of Defendant in an amount exceeding \$30,000.00 to be proven with specificity at trial.

47. Plaintiff is entitled to recover his attorney fees and costs incurred in the prosecution of this action pursuant to Idaho Code §§ 12-120; 12-121, I.R.C.P. 54, and all other applicable state law.

ATTORNEY'S FEES AND COSTS

Plaintiff is entitled to recover his costs and attorney's fees incurred in prosecuting this action, pursuant to Idaho Code §§ 12-120; 12-121, I.R.C.P. 54, and all other applicable state law.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial composed of no less than twelve (12) persons on all issues so triable, pursuant to Idaho Rule of Civil Procedure 38.

WHEREFORE, Plaintiff prays for Judgment, Order and Decree of this Court as follows:

1. For money damages from the Defendant, that fully and fairly compensate Plaintiff for Defendant's for breach and other causes of action above in a sum to be determined at trial in excess of \$10,000.00;
2. For an award of Plaintiff's reasonable attorney fees incurred in pursuing this action, pursuant to Idaho Code §§ 12-120(1), 12-121 and I.R.C.P. 54;
3. For costs of suit incurred herein; and,

4. For such other and further relief as to the Court is just and equitable.

DATED this 14th day of August, 2013.

DINIUS LAW

By: [Signature]

Kevin E. Dinius

Michael J. Hanby II

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 14th day of August, 2013, a true and correct copy of the above and foregoing document was served upon the following by:

Ronald R. Shepherd
Attorney at Law
850 E Franklin, Ste 404
Meridian, ID 83642

☐

US Mail

☐

Overnight Mail

☐

Hand Delivery

☒

Facsimile - No. 887-3443

[Signature]
for DINIUS LAW

cm\T:\Clients\K\Kosmann, Dave 24856\Non-Discovery\Amended Complaint.docx

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 7

F I L E D
A.M. 4:58 P.M.

SEP 17 2013

**CANYON COUNTY CLERK
K CANNON, DEPUTY**

RON R. SHEPHERD
R. SHEPHERD LAW, PLLC
Attorneys at Law
850 East Franklin Road, Suite 404
Meridian, ID 83642
Telephone: (208) 887-3444
Facsimile: (208) 887-3443
ISB No. 6593
ron@rshepherdlaw.com

Attorneys for Defendant/Counterclaimant

**IN THE DISTRICT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

DAVID KOSMANN,	)	Case No. CV-2013-795-C
)	
Plaintiff/Counterdefendant,)	
)	
v.	)	ANSWER TO FIRST AMENDED
	)	COMPLAINT <u>AND</u> FIRST AMENDED
LEO GILBRIDE,	)	COUNTERCLAIM
)	
Defendant/Counterclaimant.)	

The above named Defendant, Leo Gilbride ("Gilbride"), by and through his counsel of record, Ron R. Shepherd of the law firm of R. Shepherd Law, PLLC, in answer to the Amended Complaint and Demand for Jury Trial ("Amended Complaint") previously filed in this action on August 14, 2013 by the Plaintiff above named, admits, denies and alleges as follows:

ANSWER TO FIRST AMENDED COMPLAINT AND FIRST
AMENDED COUNTERCLAIM – 1

13-012 / 4844-8259-3301, v. 1

ANSWER

1. Gilbride denies each and every allegation of the Complaint that is not specifically admitted herein.
2. Gilbride admits the allegations contained in paragraphs 1, 2, 3, 4, 5 and 7.
3. Gilbride denies the allegations contained in paragraphs 8, 9, 10, 13, 15, 16, 18, 19, 20, 21, 23, 24, 25, 27, 28, 29, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 and 47.
4. Answering paragraph 6, Gilbride admits that Plaintiff David Kosmann ("Kosmann") was previously the owner of the Subject Property. It was Gilbride's understanding that Kosmann was behind on his mortgage.
5. Answering paragraph 11, Gilbride admits that the sale of the property from Kosmann to Gilbride closed on December 28, 2012. Gilbride denies the remaining allegations of paragraph 11.
6. Answering paragraph 12, Gilbride admits that Justin McCarthy was the real estate agent involved in the sale of the property from Kosmann to Gilbride.
7. Answering paragraph 14, Gilbride admits that he posted an eviction notice on Gilbride's property after Gilbride purchased the Subject Property. Gilbride denies the remaining allegations of paragraph 14.

AFFIRMATIVE DEFENSES

8. Kosmann's claims are barred and unenforceable under the statute of frauds set forth at Idaho Code § 9-503 and/or 9-508 as Kosmann alleged agreement is not in writing.
9. Kosmann signed declarations and other documents specifically stating that the sale of the property from Kosmann to Gilbride was an arm's-length transaction and that Kosmann and Gilbride did not have an agreement to sell the property back to Kosmann. As

such, Kosmann committed fraud in such transaction and therefore does not come into court with clean hands. Kosmann cannot obtain the relief he seeks under the doctrine of unclean hands.

10. Kosmann made representations to Gilbride, and Gilbride relied on those representations to his detriment in purchasing the Subject Property from Kosmann. As such, Kosmann's claims are barred under the doctrines of promissory estoppel and/or quasi estoppel.

11. Kosmann's claims are barred under the doctrine of estoppel by deed.

12. Kosmann has failed to plead with particularity the elements of fraud.

13. Kosmann has failed to state a claim upon which relief may be granted.

FIRST AMENDED COUNTERCLAIM

The above-named Defendant/Counterclaimant, Leo Gilbride ("Gilbride") for his causes of action against the Plaintiff/Counterdefendant David Kosmann ("Kosmann"), alleges and states as follows:

PARTIES

14. Gilbride is an adult resident of Canyon County, Idaho.

15. Kosmann is an adult resident of Canyon County, Idaho

JURISDICTION AND VENUE

16. Both jurisdiction and venue are proper in this court for the reasons set forth in Kosmann's Amended Complaint at ¶¶ 3 and 4.

GENERAL ALLEGATIONS

17. Gilbride purchased real property from Kosmann and obtained a warranty deed from Kosmann. The real property is located at 1020 West Homedale Road, Caldwell, Canyon County, Idaho ("Subject Property"), and is more particularly described in the Warranty Deed attached hereto as Exhibit "A" and incorporated herein by this reference.

18. Attached hereto as Exhibit "B" and incorporated herein by this reference is a true and correct copy of the Real Estate Purchase and Sale Agreement ("PSA") entered into by and between Kosmann and Gilbride in which Kosmann agreed to sell the Subject Property to Gilbride.

19. Gilbride fully performed under the PSA by paying the full purchase price to Kosmann.

20. The transaction closed on December 28, 2012.

21. Despite having sold the Subject Property to Gilbride, Kosmann remains in possession of the Subject Property and refuses to allow Gilbride access to the Subject Property or to otherwise take possession of the Subject Property.

22. Upon information and belief, Kosmann is operating a business on the Subject Property and storing numerous inoperable vehicles on the Subject Property in violation of the law.

23. As such, time is of the essence in ejecting Kosmann from the Subject Property.

INCORPORATION BY REFERENCE

24. Each and every allegation set forth in this Answer and Amended Counterclaim are incorporated in each and every count of this Amended Counterclaim.

COUNT I (Breach of Contract)

25. Paragraph 36 of the PSA states that "BUYER shall be entitled to possession upon closing."

26. The transaction closed on December 28, 2012.

27. Kosmann's refusal to vacate the Subject Property and to deliver possession of the Subject Property to Gilbride constitutes a material breach of the PSA.

28. As a direct and proximate result of Kosmann's refusal to deliver possession of the Subject Property to Gilbride, Gilbride has been damaged in an amount to be proven at trial. Gilbride's damages are ongoing and include, among other things, the fair market rental value of the Subject Property, plus the cost to remove Kosmann's personal property and effects from the Subject Property.

COUNT II
(Ejectment)

29. Gilbride is the owner of the Subject Property as evidenced by the duly recorded Warranty Deed executed by Kosmann, a copy of which is attached hereto.

30. Kosmann refuses to deliver possession of the Subject Property to Gilbride.

31. Gilbride is therefore entitled to a Decree ejecting Kosmann from the Subject Property and delivering possession thereof to Gilbride.

COUNT III
(Unlawful Detainer/Eviction)

32. Gilbride is the owner of the Subject Property, a parcel of land less than five acres.

33. Kosmann is an occupant and claims to be a tenant of the Subject Property.

34. Kosmann claims that the parties hereto entered into an oral Lease Agreement, whereby Kosmann agreed to lease the foregoing described premises from Gilbride.

35. Kosmann failed, after demand had been made according to law, to pay the rent due under the terms of the purported Lease Agreement, and unlawfully remains in possession of the Subject Property.

36. All notices required by law have been served upon Kosmann in the required manner.

37. A copy of the notice served on Kosmann is attached hereto as Exhibit "C" and incorporated herein by reference.

38. Gilbride is entitled to possession of the Subject Property as a result of Kosmann's failure to pay rent when due and failure to cure default of the Lease Agreement upon receiving notice thereof.

COSTS AND ATTORNEY FEES

1. Gilbride has been required to retain the law offices of R. Shepherd Law, PLLC, duly licensed and practicing attorneys of the state of Idaho, to defend against Kosmann's claims and to institute and prosecute Gilbride's counterclaims. Gilbride is entitled to recover his costs and attorney fees reasonably incurred in this action under Idaho Code §§ 12-120(3), 12-121, as well as Rule 54(d) and 54(e) of the Idaho Rules of Civil Procedure and paragraph 28 of the parties' PSA attached hereto.

PRAYER FOR RELIEF

WHEREFORE, Gilbride prays for relief as follows:

1. That Kosmann's Amended Complaint be dismissed with prejudice and Kosmann take nothing thereunder;
2. For the entry of a decree establishing that Gilbride is the lawful owner of the Subject Property and ejecting Kosmann from the Subject Property;
3. For a writ of assistance, in aid of a decree of ejectment, directing the Sheriff of Canyon County to remove Kosmann and his personal property and effects from the Subject Property;
4. For a money judgment against Kosmann and in favor of Gilbride for all damages Gilbride has suffered and will continue to suffer until judgment is entered and Kosmann is removed from the Subject Property;
5. For pre-judgment interest calculated at the rate provided by law;
6. For entry of an order and judgment awarding to Gilbride costs incurred herein;

7. For the entry of an order and judgment awarding to Gilbride attorney fees incurred herein in an amount of \$2,500 if this matter is uncontested and a greater amount if this matter is contested; and

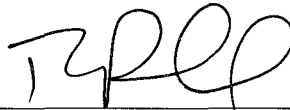
8. For such other and further relief as this Court deems just and equitable.

DEMAND FOR JURY TRIAL

Pursuant to I.R.C.P. 38, Gilbride hereby respectfully demands a jury trial of twelve people on all issues raised in this Counterclaim and triable of right by jury.

DATED this 17th day of September, 2013

R. SHEPHERD LAW, PLLC



RON R. SHEPHERD

Attorneys for Defendant/Counterclaimant

CERTIFICATE OF DELIVERY

I hereby certify that on the 17th day of September, 2013, I caused a true and correct copy of the foregoing ANSWER TO FIRST AMENDED COMPLAINT AND FIRST AMENDED COUNTERCLAIM to be served by the method indicated below, and addressed to the following:

Kevin E. Dinius
Michael J. Hanby, II
DINIUS LAW
5680 East Franklin Road, Suite 130
Nampa, ID 83687

() U.S. Mail, Postage Prepaid
() Certified Mail/Return Receipt
() Hand Delivered
(☒) Facsimile 475-0101
() Email: *kdinius@diniuslaw.com*
mhanby@diniuslaw.com



RON R. SHEPHERD

ANSWER TO FIRST AMENDED COMPLAINT AND FIRST
AMENDED COUNTERCLAIM – 7



2012-057980	
RECORDED	
12/27/2012 02:15 PM	
CHRIS YAMAMOTO	
CANYON COUNTY RECORDER	
Page 1 CMCLAUGHLIN	\$10.00
TYPE: DEED	
TITLEONE BOISE	
ELECTRONICALLY RECORDED	

Order Number: 12213146 *HE/N/A*

Warranty Deed

For value received,

David A. Kosmann and Maria Ann Kosmann, husband and wife

the grantor, does hereby grant, bargain, sell, and convey unto

Leo Joseph Gilbride a single man

whose current address is 11946 Bonnie Lane Nampa, ID 83651

the grantee, the following described premises, in Canyon County, Idaho, to wit:

Lot 6 in Block 1 of Dunn's Plat, according to the official plat thereof, filed in Book 14 of Plats at Page(s) 35, official records of Canyon County, Idaho.

To have and to hold the said premises, with their appurtenances unto the said Grantee, its heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that Grantor is the owner in fee simple of said premises; that they are free from all encumbrances except those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee; and subject to all existing patent reservations, easements, right(s) of way, protective covenants, zoning ordinances, and applicable building codes, laws and regulations, general taxes and assessments, including irrigation and utility assessments (if any) for the current year, which are not due and payable, and that Grantor will warrant and defend the same from all lawful claims whatsoever. Whenever the context so requires, the singular number includes the plural.


David A. Kosmann


Maria Ann Kosmann

State of Idaho, County of Ada ss.

On this 24th day of December in the year of 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared David A. Kosmann and Maria Ann Kosmann, known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.


Notary Public
My Commission Expires: 08/14/14
(seal)

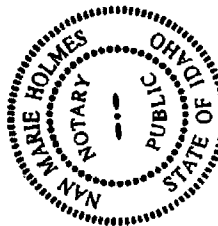


EXHIBIT "A"

ID#2784895

DATE 7/14/11

LISTING AGENCY Marc Banner Office Phone # 208.841.7610 Fax # 208.286.4869

Listing Agent Justin McCarthy E-Mail JustinTimeRE@gmail.com Phone # _____

SELLING AGENCY Marc Banner Office Phone # 208.841.7610 Fax # 208.286.4869

Selling Agent Justin McCarthy E-Mail JustinTimeRE@gmail.com Phone # _____

1. BUYER: Leo Glibridge

(Hereinafter called "BUYER") agrees to purchase, and the undersigned SELLER agrees to sell the following described real estate hereinafter referred to as "PROPERTY" COMMONLY KNOWN AS 1020 W Homedale Rd

Caldwell City Canyon County, ID, Zip 83607 legally described as:

Q4-3N-3W SW DUNNS PLAT LOT 6 BLK 1

OR Legal Description Attached as addendum # _____ (Addendum must accompany original offer).

2. \$ 111,000.00 PURCHASE PRICE: One Hundred Eleven Thousand and Zero/100 DOLLARS,
payable upon the following TERMS AND CONDITIONS (not including closing costs):

3. FINANCIAL TERMS: Note: A+C+D+E must add up to total purchase price.

(A) \$ 1,000.00 EARNEST MONEY: BUYER hereby deposits One Thousand and Zero/100
DOLLARS as Earnest Money evidenced by: ☐ cash ☐ personal check ☐ cashier's check ☐ note (due date) _____
☒ other Promissory Note and a receipt is hereby acknowledged.

Earnest Money to be deposited in trust account ☐ upon receipt or ☐ upon acceptance by BUYER and SELLER or ☒ other Upon acceptance by 3rd party.

and shall be held by: ☒ Listing Broker ☐ Selling Broker ☐ other n/a for the benefit of the parties hereto.

THE RESPONSIBLE BROKER SHALL BE: Marc Banner

(B) ALL CASH OFFER: ☒ NO ☐ YES. If this is an all cash offer do not complete Sections 3C and 3D, fill blanks with "0" (ZERO). IF CASH OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE SUBJECT TO ANY FINANCIAL CONTINGENCY. BUYER agrees to provide SELLER within 5 business days (five (5) if left blank) from the date of acceptance of this agreement by all parties, evidence of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement or contract(s) for the sale of BUYER'S current residence or other property to be sold.

(C) \$ 88,000.00 NEW LOAN PROCEEDS: This Agreement is contingent upon BUYER obtaining the following financing:
☒ FIRST LOAN of \$ 88,000.00 not including mortgage insurance, through ☒ FHA, ☐ VA, ☐ CONVENTIONAL, ☐ USDA, ☐ RURAL DEVELOPMENT, ☐ OTHER n/a with interest not to exceed _____ % for a period of _____ years at ☒ Fixed Rate ☐ Other n/a in the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER's Earnest Money may be returned at BUYER'S request. BUYER shall pay no more than 2 point(s) plus origination fee if any. SELLER shall pay no more than 2 point(s). Any reduction in points shall first accrue to the benefit of the ☒ BUYER ☐ SELLER ☐ Divided Equally ☐ N/A.

☐ SECOND LOAN of \$ _____ with interest not to exceed _____ % for a period of _____ years at ☐ Fixed Rate ☐ Other n/a. BUYER shall pay no more than _____ point(s) plus origination fee if any. SELLER shall pay no more than _____ point(s). Any reduction in points shall first accrue to the benefit of the ☐ BUYER ☐ SELLER ☐ Divided Equally ☐ N/A.

LOAN APPLICATION: BUYER ☐ has applied OR ☒ shall apply for each loan(s) within 10 business days (ten (10) if left blank) of SELLER'S acceptance, showing lender approval of credit report, income verification, debt ratios, and evidence of sufficient funds and/or proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. If such written confirmation is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying BUYER(S) in writing of such cancellation within 3 business days (three (3) if left blank) after written confirmation was required. If SELLER does not cancel within the strict time period specified as set forth herein, SELLER shall be deemed to have accepted such written confirmation of lender approval and shall be deemed to have elected to proceed with the transaction. SELLER'S approval shall not be unreasonably withheld. If an appraisal is required by lender, the PROPERTY must appraise at not less than purchase price or BUYER'S Earnest Money may be returned at BUYER'S request. BUYER may also apply for a loan with different conditions and costs and close transaction provided all other terms and conditions of this Agreement are fulfilled, and the new loan does not increase the costs or requirements to the SELLER. FHA / VA: If applicable, it is expressly agreed that notwithstanding any other provisions of this contract, BUYER shall not be obligated to complete the purchase of the PROPERTY described herein or to incur any penalty or forfeiture of Earnest Money deposits or otherwise unless BUYER has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Veterans Administration or a Direct Endorsement lender setting forth the appraised value of the PROPERTY of not less than the sales price as stated in the contract.

(D) \$ _____ ADDITIONAL FINANCIAL TERMS:
☐ Additional financial terms are specified under the heading "OTHER TERMS AND/OR CONDITIONS" (Section 4).
☐ Additional financial terms are contained in a FINANCING ADDENDUM of same date, attached hereto, signed by both parties.

(E) \$ 24,000.00 APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING (Not including closing costs): Cash at closing to be paid by BUYER at closing in GOOD FUNDS, includes: cash, electronic transfer funds, certified check or cashier's check. NOTE: If any of above loans being Assumed or taken "subject to", any net differences between the approximate balances and the actual balance of said loan(s) shall be adjusted at closing of escrow in: ☒ Cash ☐ Other n/a

BUYER'S Initials JA Date 18 SEPT 12 SELLER'S Initials PK MK Date 9-24-12

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EXHIBIT "B"

PROPERTY ADDRESS:

1020 W. Homedale Rd.

Caldwell

ID#

3784895

4. OTHER TERMS AND/OR CONDITIONS: This Agreement is made subject to the following special terms, considerations and/or contingencies which must be satisfied prior to closing. Offer is contingent upon 3rd party bank (GMAC) releasing the mortgage as paid in full, and

releasing rights to pursuit of a deficiency judgement.

Seller will rent the property back from the buyer for a term of not less than 1 year.

5. ITEMS INCLUDED & EXCLUDED IN THIS SALE: All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television, antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, oil ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than \$100.

(A) ADDITIONAL ITEMS SPECIFICALLY INCLUDED IN THIS SALE: n/a

(B) ITEMS SPECIFICALLY EXCLUDED IN THIS SALE: private property

6. MINERAL RIGHTS: Any and all mineral rights appurtenant to the PROPERTY are included in and are part of the sale of this PROPERTY unless otherwise agreed to by the parties in writing.

7. WATER RIGHTS: Any and all water rights including but not limited to water systems, wells, springs, lakes, streams, ponds, rivers, ditches, ditch rights, and the like, if any, appurtenant to the PROPERTY are included in and are a part of the sale of this PROPERTY unless otherwise agreed to by the parties in writing.

8. TITLE CONVEYANCE: Title of SELLER is to be conveyed by warranty deed, unless otherwise provided, and is to be marketable and insurable except for rights reserved in federal patents, state or railroad deeds, building or use restrictions, building and zoning regulations and ordinances of any governmental unit, and rights of way and easements established or of record. Liens, encumbrances or defects to be discharged by SELLER may be paid out of purchase money at date of closing. No liens, encumbrances or defects which are to be discharged or assumed by BUYER or to which title is taken subject to, exist unless otherwise specified in this Agreement.

9. TITLE INSURANCE: There may be types of title insurance coverages available other than those listed below and parties to this agreement are advised to talk to a title company about any other coverages available that will give the BUYER additional coverage.

(A) PRELIMINARY TITLE COMMITMENT: Prior to closing the transaction, ☒ SELLER or ☐ BUYER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said PROPERTY. BUYER shall have 5 business days (five [5] if left blank) from receipt of the preliminary commitment or not fewer than twenty-four (24) hours prior to closing, within which to object in writing to the condition of the title as set forth in the preliminary commitment. If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title. It is agreed that if the title of said PROPERTY is not marketable, or cannot be made so within 5 business days (five [5] if left blank) after notice containing a written statement of defect is delivered to SELLER, BUYER'S Earnest Money deposit will be returned to BUYER and SELLER shall pay for the cost of title insurance cancellation fee, escrow and legal fees, if any.

(B) TITLE COMPANY: The parties agree that Nan Holmes at Title One Corp. Title Company located at 1101 W River St. #201 Boise, ID 83702 shall provide the title policy and preliminary report of commitment.

(C) STANDARD COVERAGE OWNER'S POLICY: SELLER shall within a reasonable time after closing furnish to BUYER a title insurance policy in the amount of the purchase price of the PROPERTY showing marketable and insurable title subject to the liens, encumbrances and defects elsewhere set out in this Agreement to be discharged or assumed by BUYER unless otherwise provided herein. The risk assumed by the title company in the standard coverage policy is limited to matters of public record. BUYER shall receive a ILTA/ALTA Owner's Policy of Title Insurance. A title company, at BUYER's request, can provide information about the availability, desirability, coverage and cost of various title insurance coverages and endorsements. If BUYER desires title coverage other than that required by this paragraph, BUYER shall instruct Closing Agency in writing and pay any increase in cost unless otherwise provided herein.

(D) EXTENDED COVERAGE LENDER'S POLICY (Mortgagee policy): The lender may require that BUYER (Borrower) furnish an Extended Coverage Lender's Policy. This extended coverage lender's policy considers matters of public record and additionally insures against certain matters not shown in the public record. This extended coverage lender's policy is solely for the benefit of the lender and only protects the lender.

BUYER'S Initials JK Date 18 SEPT 12

SELLER'S Initials JK MK Date 9-24-12

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PROPERTY ADDRESS:

1020 W Homedale Rd.

Caldwell

ID#:

3784895

10. INSPECTION:

(A) BUYER chooses ☒ to have inspection ☐ not to have inspection. If BUYER chooses not to have inspection, skip Section 10C. BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense. BUYER shall, within 10 business days (ten [10] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection. BUYER is strongly advised to exercise these rights and to make BUYER'S own selection of professionals with appropriate qualifications to conduct inspections of the entire PROPERTY. SELLER shall make PROPERTY available for inspection and agrees to accept the responsibility and expense for making sure all the utilities are turned on for the inspection except for phone and cable. Some inspections, investigations, tests, surveys and other studies may require additional days to complete. The parties agree that unless specifically set forth below, the above timeframe for investigations, tests, surveys and other studies shall govern. Additional inspections/timeframes: n/a

(B) **FHA INSPECTION REQUIREMENT.** If applicable: "For Your Protection: Get a Home Inspection", HUD 92664-CN must be signed on or before execution of this agreement.

(C). SATISFACTION/REMOVAL OF INSPECTION CONTINGENCIES:

1). If BUYER does not within the strict time period specified give to SELLER written notice of disapproved items or written notice of termination of this Agreement, BUYER shall conclusively be deemed to have: (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

2). If BUYER does within the strict time period specified give to SELLER written notice of termination of this Agreement based on an unsatisfactory inspection, the parties will have no obligation to continue with the transaction and the Earnest Money shall be returned to BUYER.

3). If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall provide to SELLER pertinent portion(s) of written inspection reports. SELLER shall have 3 business days (three [3] if left blank) in which to respond in writing. SELLER, at SELLER'S option, may correct the items as specified by BUYER in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within 5 business days (five [5] if left blank) of receipt of SELLER'S response, then both parties agree that they will continue with the transaction and proceed to closing. This will remove BUYER'S inspection contingency.

4). If both parties do not come to a consensus as to the disapproved items to be corrected by SELLER within the strict time period specified, or SELLER does not respond in writing within the strict time period specified, then the BUYER has the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice within 3 business days (three [3] if left blank) that they will not continue with the transaction and will receive their Earnest Money back.

5). If BUYER does not give such written notice of cancellation within the strict time periods specified, BUYER shall conclusively be deemed to have elected to proceed with the transaction without repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct. SELLER shall make the PROPERTY available for all inspections. BUYER shall keep the PROPERTY free and clear of items, indemnify and hold SELLER harmless from all liability, claims, demands, damages and costs; and repair any damages arising from the inspections. No inspections may be made by any governmental building or zoning inspector or government employee without the prior consent of SELLER unless required by local law.

11. LEAD PAINT DISCLOSURE: The subject PROPERTY ☒ is ☐ is not defined as "Target Housing" regarding lead-based paint or lead-based paint hazards. The term lead-based paint hazards is intended to identify lead-based paint and all residual lead-containing dusts and soils regardless of the source of the lead. If yes, BUYER hereby acknowledges the following: (a) BUYER has been provided an EPA approved lead-based paint hazard information pamphlet, "Protect Your Family From Lead in Your Home", (b) receipt of SELLER'S Disclosure of Information and Acknowledgment Form and have been provided with all records, test reports or other information, if any, related to the presence of lead-based paint hazards on said PROPERTY, (c) that this contract is contingent upon BUYER'S right to have the PROPERTY tested for lead-based paint hazards to be completed no later than n/a or the contingency will terminate, (d) that BUYER hereby ☒ waives ☐ does not waive this right, (e) that if test results show unacceptable amounts of lead-based paint on the PROPERTY, BUYER has the right to cancel the contract subject to the option of the SELLER to be given in writing) to elect to remove the lead-based paint and correct the problem which must be accomplished before closing, (f) that if the contract is canceled under this clause, BUYER'S earnest money deposit will be returned to BUYER. Additionally, if any structure was built before 1978 and is a residential home, apartment or child-occupied facility such as a school or day-care center, federal law requires contractors that disturb lead-based paint in that structure to provide the owner with a "Renovate Right" pamphlet. The contractor shall be certified and follow specific work practices to prevent lead contamination.

12. MOLD DISCLAIMER: BUYER is hereby advised that mold and/or other microorganisms may exist at the Property. Upon closing BUYER acknowledges and agrees to accept full responsibility and risk for any matters that may result from mold and/or other microorganisms and to hold SELLER and any Broker or agent representing SELLER or BUYER harmless from any liability or damages (financial or otherwise) relating to such matters.

BUYER'S Initials JD Date 19 SEPT 12SELLER'S Initials JK MK Date 9-24-12

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PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID# 3784895

13. **SQUARE FOOTAGE VERIFICATION:** BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY OR IMPROVEMENTS IS APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD.

14. **SELLER'S PROPERTY CONDITION DISCLOSURE FORM:** If required by Title 55, Chapter 25 Idaho Code SELLER shall within ten (10) calendar days after execution of this Agreement provide to BUYER or BUYER'S agent, "Seller's Property Condition Disclosure Form" or other acceptable form. BUYER has received the "Seller's Property Condition Disclosure Form" or other acceptable form prior to signing this Agreement. ☐ Yes ☒ No ☐ N/A

15. **COVENANTS, CONDITIONS AND RESTRICTIONS (CC&Rs):** As part of the BUYER'S inspection of the PROPERTY, as set forth in Section 10, BUYER is responsible for obtaining and reviewing a copy of any CC&Rs which may affect the PROPERTY. BUYER shall have 10 business days (ten [10] if left blank) (but in no event shall such time period exceed that time period set forth for inspections in Section 10) to review and approve of any such CC&Rs that may affect the PROPERTY. Unless BUYER delivers to SELLER a written and signed objection to the terms of any applicable CC&Rs with particularity describing BUYER's reasonable objections within such time period as set forth above, BUYER shall be deemed to have conclusively waived any objection to the terms of any CC&Rs affecting the PROPERTY.

16. **SUBDIVISION HOMEOWNER'S ASSOCIATION:** BUYER is aware that membership in a Home Owner's Association may be required and BUYER agrees to abide by the Articles of Incorporation, Bylaws and rules and regulations of the Association. BUYER is further aware that the PROPERTY may be subject to assessments levied by the Association described in full in the Declaration of Covenants, Conditions and Restrictions. BUYER has reviewed Homeowner's Association Documents: ☐ Yes ☐ No ☒ N/A. Association fees/dues are \$ n/a per n/a. ☐ BUYER ☐ SELLER ☒ N/A to pay Homeowner's Association SET UP FEE of \$ n/a and/or PROPERTY TRANSFER FEES of \$ n/a at closing.

17. **COSTS PAID BY:** The parties agree to pay the following costs as indicated below. None of the costs to be paid by the parties in this section creates an inspection or performance obligation other than strictly for the payment of costs. There may be other costs incurred in addition to those set forth below. Such costs may be required by the lender, by law, or by other such circumstances.

SELLER agrees to pay up to \$ 10,000 (\$0 if left blank) of lender required repair costs only. BUYER or SELLER has the option to pay any lender required repair costs in excess of this amount.

Upon closing SELLER agrees to pay up to EITHER n/a % (N/A if left blank) of the purchase price OR \$ n/a (N/A if left blank) of lender approved BUYER'S closing costs, lender fees, and prepaid costs which includes but is not limited to those items in BUYER column marked below.

	BUYER	SELLER	Shared Equally	N/A		BUYER	SELLER	Shared Equally	N/A
Appraisal Fee		X			Title Ins. Standard Coverage & Owner's Policy		X		
Appraisal Re-inspection Fee		X			Title Ins. Extended Coverage Lender's Policy - Mortgagee Policy		X		
Closing Escrow Fee		X			Additional Title Coverage				X
Lender Document Preparation Fee		X			Full Tank - Dollar Amount to be Determined by Supplier				X
Tax Service Fee		X			Domestic Well Water Potability Test				X
Flood Certification/Tracking Fee		X			Domestic Well Water Productivity Test				X
Lender Required Inspections		X			Septic Inspections		X		
Attorney Contract Preparation or Review Fee		X			Septic Pumping		X		
Home Warranty Plan				X	Survey		X		

18. **OCCUPANCY:** BUYER ☐ does ☒ does not intend to occupy PROPERTY as BUYER'S primary residence.

19. **RISK OF LOSS OR NEGLIGENCE:** Prior to closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire, neglect, or other destructive cause prior to closing, this agreement shall be voidable at the option of the BUYER.

BUYER'S Initials (JL) Date 18 SEP 12

SELLER'S Initials (JK MK) Date 9-24-12

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PROPERTY ADDRESS:

1020 W Homedale Rd.

Caldwell

ID#:

3784895

242: **20. FINAL WALK THROUGH:** The SELLER grants BUYER and any representative of BUYER reasonable access to conduct a final walk through
 243: inspection of the PROPERTY approximately 3 calendar days (three (3) if left blank) prior to close of escrow, NOT AS A CONTINGENCY OF THE
 244: SALE, but for purposes of satisfying BUYER that any repairs agreed to in writing by BUYER and SELLER have been completed and PROPERTY are in
 245: substantially the same condition as on the date this offer is made. SELLER shall make PROPERTY available for the final walk through and agrees to accept
 246: the responsibility and expense for making sure all the utilities are turned on for the walk through except for phone and cable. If BUYER does not conduct a
 247: final walk through, BUYER specifically releases the SELLER and Broker(s) of any liability.

248: **21. SINGULAR AND PLURAL** terms each include the other, when appropriate.

249: **22. FORECLOSURE NOTICE:** If the PROPERTY described above is currently involved in a foreclosure proceeding (pursuant to Idaho Code §45-1506)
 250: any contract or agreement with the owner or owners of record that involves the transfer of any interest in residential real property, as defined in §45-
 251: 525(5)(b), Idaho Code, subject to foreclosure must be in writing, and must be accompanied by and affixed to RE-42 Property Foreclosure Disclosure Form.

252: **23. MECHANIC'S LIENS - GENERAL CONTRACTOR DISCLOSURE STATEMENT NOTICE:** BUYER and SELLER are hereby notified that,
 253: subject to Idaho Code §45-525 et seq., a "General Contractor" must provide a Disclosure Statement to a homeowner that describes certain rights afforded to
 254: the homeowner (e.g. lien waivers, general liability insurance, extended policies of title insurance, surety bonds, and sub-contractor information). The
 255: Disclosure Statement must be given to a homeowner prior to the General Contractor entering into any contract in an amount exceeding \$2,000 with a
 256: homeowner for construction, alteration, repair, or other improvements to real property, or with a residential real property purchaser for the purchase and sale
 257: of newly constructed property. Such disclosure is the responsibility of the General Contractor and it is not the duty of your agent to obtain this information on
 258: your behalf. You are advised to consult with any General Contractor subject to Idaho Code §45-525 et seq. regarding the General Contractor Disclosure
 259: Statement.

260: **24. SALES PRICE INFORMATION:** Pursuant to Idaho Code §54-2083(b)(d), a "sold" price of real property is not confidential client information.

261: **25. TRANSMISSION OF DOCUMENTS:** Facsimile or electronic transmission of any signed original document, and retransmission of any signed
 262: facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the
 263: Closing Agency, the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.

264: **26. BUSINESS DAYS:** A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real
 265: PROPERTY is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized
 266: by the state of Idaho as found in Idaho Code §73-108. The time in which any act required under this agreement is to be performed shall be computed by
 267: excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal holiday, then the
 268: time for performance shall be the next subsequent business day.

269: **27. CALENDAR DAYS:** A calendar day is herein defined as Monday through Sunday, midnight to midnight, in the local time zone where the subject real
 270: PROPERTY is physically located. A calendar day shall include any legal holiday. The time in which any act required under this agreement is to be performed
 271: shall be computed by excluding the date of execution and including the last day, thus the first day shall be the day after the date of execution. Any reference
 272: to "day" or "days" in this agreement means the same as calendar day, unless specifically enumerated as a "business day."

273: **28. ATTORNEY'S FEES:** If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this
 274: Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees
 275: on appeal.

276: **29. DEFAULT:** If BUYER defaults in the performance of this Agreement, SELLER has the option of (1) accepting the Earnest Money as liquidated
 277: damages or (2) pursuing any other lawful right and/or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make
 278: demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER'S Broker
 279: on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of title insurance, escrow fees, appraisal, credit report
 280: fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER'S
 281: Broker, provided that the amount to be paid to SELLER'S Broker shall not exceed the Broker's agreed-to commission. SELLER and BUYER specifically
 282: acknowledge and agree that if SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER'S sole and exclusive remedy, and
 283: such shall not be considered a penalty or forfeiture. If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs
 284: incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title
 285: insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees; with any balance of the Earnest Money to be held pending
 286: resolution of the matter. If SELLER defaults, having approved said sale and fails to consummate the same as herein agreed, BUYER'S Earnest Money
 287: deposit shall be returned to him/her and SELLER shall pay for the costs of title insurance, escrow fees, appraisal, credit report fees, inspection fees,
 288: brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be
 289: entitled.

290: **30. EARNEST MONEY DISPUTE / INTERPLEADER:** Notwithstanding any termination or breach of this Agreement, BUYER and SELLER agree that
 291: in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, Broker may reasonably rely on the terms
 292: of this Agreement or other written documents signed by both parties to determine how to disburse the disputed money. However, Broker or closing agency
 293: shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties
 294: and deposit any moneys or things of value into a court of competent jurisdiction and shall recover all costs which were incurred as a result of the dispute
 295: including, but not limited to, reasonable attorney's fees.

296: **31. COUNTERPARTS:** This Agreement may be executed in counterparts. Executing an agreement in counterparts shall mean the signature of two
 297: identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies
 298: shall together constitute one and the same instrument.

BUYER'S Initials (JM) Date 18 SEPT 12

SELLER'S Initials (MK) Date 9-24-12

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PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID# 3784895

32. "NOT APPLICABLE" DEFINED: The letters "n/a," "N/A," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.

33. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

34. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S):

Section 1:

- ☐ A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).
☒ B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.
☐ C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).
☐ D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

Section 2:

- ☐ A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).
☒ B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.
☐ C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).
☐ D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party confirms that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

35. CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing agency all funds and instruments necessary to complete this transaction. Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER. The closing shall be no later than (Date) 12/31/12.

The parties agree that the CLOSING AGENCY for this transaction shall be Nan Holmes at Title One Corp.
 located at 1101 River St. #201, Boise, ID 83702.

If a long-term escrow / collection is involved, then the long-term escrow holder shall be n/a.

36. POSSESSION: BUYER shall be entitled to possession ☒ upon closing or ☐ date n/a time n/a ☐ A.M. ☐ P.M. Property taxes and water assessments (using the last available assessment as a basis), rents, interest and reserves, liens, encumbrances or obligations assumed, fuel in fuel tank, and utilities shall be prorated as of closing.

37. ASSIGNMENT: This Agreement and any rights or interests created herein ☒ may ☐ may not be sold, transferred, or otherwise assigned.

38. ENTIRE AGREEMENT: This Agreement contains the entire Agreement of the parties respecting the matters herein set forth and supersedes all prior Agreements between the parties respecting such matters. No warranties, including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party.

39. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

40. AUTHORITY OF SIGNATORY: If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.

41. ACCEPTANCE: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) 9/24/12 at (Local Time in which PROPERTY is located) 5 ☐ A.M. ☒ P.M. If acceptance of this offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within 3 calendar days (three (3) if left blank) by BUYER initialing HERE _____. If BUYER simply approves of SELLER's late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER.

BUYER'S Initials JA Date 18 SEPT 12

SELLER'S Initials JKML Date 9-24-12

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PROPERTY ADDRESS: 1020 W Homedale Rd. Caldwell ID# 3784885

42. BUYER'S SIGNATURES:

☐ SEE ATTACHED BUYER'S ADDENDUM(S): _____ (Specify number of BUYER addendum(s) attached.)BUYER ☐ does ☐ does not currently hold an active Idaho real estate license.BUYER Signature [Signature]BUYER (Print Name) Leo GilbridaDate 7/31/12 Time 10:00 ☒ A.M. ☐ P.M.Phone # 208.250.7439 Cell # _____Address 11946 Bonnie Ln.City Nampa State ID Zip 83651E-Mail propilot4@yahoo.com

Fax # _____

BUYER ☐ does ☐ does not currently hold an active Idaho real estate license.

BUYER Signature _____

BUYER (Print Name) _____

Date _____ Time _____ ☐ A.M. ☐ P.M.

Phone # _____ Cell # _____

Address _____

City _____ State _____ Zip _____

E-Mail _____

Fax # _____

43. SELLER'S SIGNATURES: On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof on the part of the SELLER.

☐ SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER☐ SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) # _____SELLER ☐ does ☒ does not currently hold an active Idaho real estate license.SELLER Signature [Signature]SELLER (Print Name) David A. KosmannDate 9-24-12 Time 10:00 ☒ A.M. ☐ P.M.Phone # _____ Cell # 208.260.9755Address 1020 W Homedale Rd.City Caldwell State ID Zip 83607

E-Mail _____

Fax # _____

CONTRACTOR REGISTRATION # (if applicable) _____

SELLER ☐ does ☒ does not currently hold an active Idaho real estate license.SELLER Signature [Signature]SELLER (Print Name) Maria KosmannDate 9-24-12 Time 10:30 ☒ A.M. ☐ P.M.Phone # _____ Cell # (208) 250-4955Address 1307 W. Hawk Ct.City NAMPA State ID Zip 83651E-Mail loveiskind11@gmail.com

Fax # _____

CONTRACTOR REGISTRATION # (if applicable) _____

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ADDENDUM # 1 (All addendums shall be numbered sequentially.)
RE-11 ADDENDUM
JULY 2012 EDITION
Page 1 of 1
Idaho Association of REALTORS®
THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

Date: 9-24-12

This is an ADDENDUM to the ☒ Purchase and Sale Agreement ☐ Other
("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 9/14/12 ID# 3784895

ADDRESS: 1020 W Homedale Rd., Caldwell, ID 83607

BUYER(S): Leo Gilbride

SELLER(S): David A. Kosmann and Maria A. Kosmann

The undersigned parties hereby agree as follows:
Seller and Buyer each represent that the sale is an "Arm's Length" transaction and the seller and buyer are unrelated to each other by family, marriage or commercial enterprise.

The Buyer agrees not to sell the property within 90 days of closing of the sale.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: [Signature] Date: 02 OCT 12

BUYER: _____ Date: _____

SELLER: [Signature] Date: 24 SEP 2012

SELLER: [Signature] Date: 24 SEP 2012


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JULY 2012 EDITION

RE-11 ADDENDUM

Page 1 of 1


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ADDENDUM # 2 (All addendums shall be numbered sequentially.)

RE-11 ADDENDUM

JULY 2012 EDITION
Page 1 of 1



THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

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Date: 10/22/2012

This is an ADDENDUM to the ☒ Purchase and Sale Agreement ☐ Other n/a
 ("Addendum" means that the information below is added material for the agreement (such as flats or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 9/14/12 ID # 3784886

ADDRESS: 1020 W Homedale Rd., Caldwell, ID 83607

BUYER(S): Leo Gilbride

SELLER(S): David A. Kosmann and Maria A. Kosmann

The undersigned parties hereby agree as follows:
Adjust purchase price to \$117,500.00
 *****END*****

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: *Leo Gilbride*

BUYER: _____

SELLER: *Maria Kosmann*

SELLER: *David Kosmann*

Date: 26 OCT 12

Date: _____

Date: 26 OCT 12

Date: 26 OCT 2012

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JULY 2012 EDITION

RE-11 ADDENDUM

Page 1 of 1

THREE-DAY NOTICE TO PAY RENT OR VACATE

To: DAVE ROSMANN / MAKALA ROSMANN / SUB-TENANTS
Name(s) of Tenant(s)/Sub-tenant(s)

NOTICE: you are in default in payment of rent for the property at 1020 W. HOMERDALE
CANONVILLE, ID.. You must either pay the rent due in the amount of \$ 3200⁰⁰, or
move out within three (3) days after you receive this notice.

If you fail to either pay the rent in full or move out within three (3) days, you can be sued for
eviction and forced to move. You may also be required to pay all fees and court costs, including
attorney fees.

Date: 11 JAN 2013

Leo G. Gubridge
Owner/Agent

LEO GUBRIDGE
Typed/printed name

Address: 11946 BONNIE LN.
Nampa, ID 83657

FILED
9:20 A.M. P.M.

MAR 30 2015

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID A. KOSMANN,)
)
Plaintiff,)
)
vs.)
)
LEO GILBRIDE,)
)
Defendant.)

**MEMORANDUM DECISION
FOLLOWING COURT TRIAL**

CV-2013-795-C

INTRODUCTION

Plaintiff David Kosmann's First Amended Complaint and Demand for Jury Trial, filed August 14, 2013, includes five claims for relief against Defendant Leo Gilbride: Count One: Breach of Contract; Count Two: Specific Performance; Count Three: Breach of the Covenant of Good Faith and Fair Dealing; Count Four: Unjust Enrichment; and Count Five: Fraud. The claims arise out of Kosmann's sale of a parcel of real property, located in Canyon County, to Gilbride and an alleged oral contract or promise by Gilbride to reconvey the property to Kosmann.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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ORIGINAL

By Order entered August 9, 2013, the court granted Defendant's Motion for Summary Judgment dismissing Counts I and III of the Complaint, which sought damages for breach of contract and breach of the covenant of good faith and fair dealing.

Defendant Leo Gilbride filed his Answer to First Amended Complaint and First Amended Counterclaim on September 17, 2013. The Counterclaim includes three counts: (1) Breach of the contract for sale of the property from Kosmann to Gilbride; (2) Ejectment; (3) Unlawful Detainer/Eviction.

On January 27, 2015, the parties commenced a scheduled four-day jury trial before the court.

On January 29, 2015, at the conclusion of Plaintiff's case-in-chief, Defendant moved for an order dismissing the remaining claims asserted against him. The court granted Defendant's motion to dismiss Count Two: Specific Performance, because the evidence did not establish a contract sufficiently definite in its terms to be specifically enforced; reserved decision on the motion to dismiss Count Five: Fraud; and denied the motion to dismiss Count Four: Unjust Enrichment.

After the court's determination on Defendant's motion to dismiss, the parties jointly stipulated to and requested that the remainder of the trial take place before the court without a jury. The court agreed to this request, in an effort to accommodate the desires of the parties.

The court trial concluded on January 29, 2015.

On February 13, 2015, the parties filed the following with the court: (1) Plaintiff's Post-Trial Brief; (2) Plaintiff's Proposed Findings of Fact and Conclusions of Law; (3) Defendant's

MEMORANDUM DECISION FOLLOWING COURT TRIAL

Post Trial Memorandum; and (4) Defendant's Proposed Findings of Fact and Conclusions of Law. The court deemed the matter submitted for decision on February 13, 2015.

This Memorandum Decision constitutes the court's findings of fact and conclusions of law pursuant to I.R.C.P. 52(a). The court has incorporated its findings of fact into the analysis of each of the claims placed before it for determination as trier of fact.

STANDARD OF DECISION: BENCH TRIAL

In rendering a decision after a trial without a jury, this court's findings of fact must be supported by the evidence in the record and its conclusions of law must be supported by the findings of fact. *Benninger v. Derifield*, 142 Idaho 486, 488-89, 129 P.3d 1235, 1237-38 (2006) (citing *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 949, 812 P.2d 253, 256 (1991)). The court's findings of fact must not be clearly erroneous, *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006), and must be based on substantial, even if conflicting, evidence. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238.

ANALYSIS

Plaintiff's Claims

I. Unjust Enrichment

Count IV of the Amended Complaint includes the following allegations:

31. Kosmann conferred a benefit upon Gilbride by providing the funds necessary to close the transaction and in agreeing to transfer the Property, with the expectation that it would be transferred back.

32. Gilbride was aware of and appreciated the benefits conferred upon him by Kosmann.

33. It is inequitable for Gilbride to retain the benefits described above without compensating Kosmann.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

“Unjust enrichment occurs where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust.” *Vanderford Co. v. Knudson*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007) (citing *Beco Constr. Co. v. Bannock Paving Co.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990)). A prima facie case for unjust enrichment exists where: “(1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.” *Stevenson v. Windermere Real Estate/Capital Grp., Inc.*, 152 Idaho 824, 827, 275 P.3d 839, 842 (2012) (quoting *Vanderford Co.*, 144 Idaho at 558, 165 P.3d at 272). “A person confers a benefit upon another if he or she gives the other some interest in money, land, or possessions, performs services beneficial to or at the request of the other, satisfies the debt of the other, or in any other way adds to the other's advantage.” 42 C.J.S. *Implied Contracts* § 9 (2013).

Unjust enrichment is a measure of equitable recovery. *Clayson v. Zebe*, 153 Idaho 228, 232, 280 P.3d 731, 735 (2012). “The application of equitable remedies is a question of fact because it requires a balancing of the parties' equities.” *Id.* (quoting *Farrell v. Whiteman* (*Farrell II*), 152 Idaho 190, 194, 268 P.3d 458, 462 (2012)).

Based on the above findings, the court concludes that Plaintiff has established that he conferred a benefit upon Defendant, in the form of payment of \$30,990.00 toward Defendant's purchase of the subject property, and that Defendant realized and accepted receipt of such benefit.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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Although there is some conflicting evidence in the record, the court also concludes that a preponderance of the evidence establishes that Defendant received and accepted the \$30,990.00 under circumstances that render it inequitable for Defendant to retain that sum. Specifically, the court concludes that Plaintiff paid the \$30,990.00 to Defendant in furtherance of an unenforceable agreement whereby Defendant would purchase the property from Plaintiff and re-convey the property to Plaintiff at a later date. Since Defendant purchased and obtained title to the property with no obligation and/or intention to re-convey the property to Plaintiff, the court concludes that it would be inequitable for Defendant to retain the \$30,990.00.

Defendant contends that a preponderance of the evidence does not support the conclusion that it would be inequitable for Defendant to retain the sums paid to him by Plaintiff because “he had an oral contract with Plaintiff to sell Plaintiff car parts and that such agreement was made in the summer of 2012.” **Defendant’s Post-Trial Memorandum, p. 4.** Defendant’s entire argument on this point is summed up in his Post-Trial Memorandum:

The first \$22,750 in cash was given to Defendant in September 2012, four months before the house sale closed and before the parties had even signed the Real Estate Purchase and Sale Agreement. This supports Defendant’s claim that the money was for cars and parts and not money toward the house. The other two payments were made in October and November, again long before the house deal was to close. The down payment wasn’t even due until the closing of the house purchase on December 27, 2012. The timing of the payments supports Defendant’s claim that the money was for something other than a down payment. Defendant testified that he did not give Plaintiff the car parts with the partial payments because they had agreed that the cars and parts were a package deal, and that to break away parts of the package left him in a vulnerable position if the remaining amounts were not paid.

Defendant testified at trial that the cars and parts are available for Plaintiff to pick up and that he would give them to Plaintiff even without the final \$250.00 payment. Defendant also testified that the cars and car parts had value to support the amount of consideration paid by Plaintiff.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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3. Plaintiff's Claims Regarding the Money Given to Defendant Are Not Credible

As the Court is aware, Plaintiff tells a different story. Plaintiff claims that the money he gave Defendant was to be used as a down payment on the short sale of the residence at issue in this case. Plaintiff testified that rather than take the \$29,750.00 and use it to catch up his mortgage payments and stay in the residence, that he gave it to Defendant as part of a plan to get out of his mortgage and then to buy back the residence at something much less than he owed previously, leaving GMAC with the deficiency.

Defendant's Post-Trial Memorandum, pp. 4-7.

The court does not find Defendant's testimony and arguments regarding the car parts contract to be credible. Just as the evidence failed to support Plaintiff's claim that the parties had an enforceable contract for re-conveyance of the property from Defendant to Plaintiff, the evidence does not support the existence of an agreement for the sale of car parts, much less that the \$30,990.00 Plaintiff paid to Defendant between September and December of 2012 was in furtherance of such an agreement. In fact, the timing of the payments make more sense in the context of the parties' agreement that Plaintiff would fund the down payment and closing costs as a condition of Defendant agreeing to purchase the real property. The evidence establishes that Plaintiff paid Defendant \$22,990.00 on September 23, 2012, the day before Plaintiff executed the purchase and sale agreement. Plaintiff subsequently paid Defendant \$3,000.00 on October 1 and \$4,000.00 on November 19, 2012. At their December 28, 2012 meeting at Shari's Restaurant, when Plaintiff stated to Defendant that he put money toward Defendant's loan, Defendant responded, "That's right, you did." There is no reason Defendant would have made such an admission if the payments from Plaintiff to Defendant had been made on an executory contract for the purchase of automobiles and automobile parts. The court does not believe Defendant's explanation at trial that he was simply allowing Plaintiff to talk, since Defendant was very direct

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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and adamant in addressing every matter Plaintiff raised at that meeting. At the same meeting, when Plaintiff asked Defendant what he did with \$1000.00 dollars Plaintiff paid to Defendant in late December, Defendant stated, "We'll put that on the security deposit for the house."

Defendant made that statement despite the fact that the parties had no rental agreement at that juncture, Defendant having insisted on a written agreement which he had provided to Plaintiff on December 27, 2012, and despite the fact that, according to Defendant's contention, all the sums Plaintiff had previously paid were in performance of the auto parts sale agreement and there was only \$250.00 remaining to be paid on the auto parts agreement. There is nothing in the record to explain why Defendant did not apply at least \$250.00 of the \$1000.00 to the outstanding balance on the auto parts agreement or why Plaintiff would not have questioned why Defendant did not apply the payment to the balance due on the auto parts agreement.

The court finds the testimony of Michelle Phillips credible and probative on this issue. Ms. Phillips' testimony establishes that, at least as late as October 2012, Defendant stated to her that the sums Defendant received from Plaintiff in the summer and fall of 2012, and the sums he expected to receive from Plaintiff thereafter, were related to the transaction involving Plaintiff's house. Ms. Phillips also testified that Defendant made no mention of any auto parts sale in connection with the funds paid, and to be paid, by Plaintiff.

Defendant also offered testimony from Stewart Billings and Angel Gilbride regarding statements made by Defendant regarding the auto parts deal with Plaintiff. Defendant contends that the statements are "relevant and admissible" because they were not offered "to prove the terms of the deal, but rather . . . offered to show the fact that the statement itself was made and that Defendant's state of mind in the summer of 2012 was that he believed he had a deal with

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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Plaintiff to sell car parts.” **Defendant’s Post-Trial Memorandum, p. 5.** The court does not agree that the proposed testimony is relevant, since Defendants contend that it was offered to prove Defendant’s subjective belief regarding the existence of an agreement. The subjective intent of a party is not relevant to the determination of whether a contract has been formed. 1 Williston on Contracts § 3:5 (4th ed.). For the same reason, even if the testimony were relevant, it would be only minimally so and would not be sufficient to support a conclusion that a contract for sale of auto parts existed, much less that the payments made by Plaintiff to Defendant in the summer and fall of 2012 were made pursuant to such a contract.

A. Unclean Hands Defense

In his Post-Trial Memorandum, Defendant asserts that the court should deny Plaintiff relief on his unjust enrichment claim, because Plaintiff comes to the court with unclean hands as the result of his execution of an arms’-length affidavit in favor of GMAC. The court addressed Defendant’s unclean hands defense in its Order Motion for Summary Judgment, entered August 9, 2013:

Defendant seeks summary judgment dismissing Plaintiff’s specific performance and unjust enrichment claims because “Kosman is asking this Court to ignore that he perpetrated a fraud against his mortgage company in order to substantially reduce the amount he was obligated to pay for the subject property.”

The clean hands doctrine is a well-established principle in Idaho. *See Malcolm v. Hanmer*, 64 Idaho 66, 127 P.2d 331 (1942). Simply stated, the maxim stands for the proposition that “a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.” *See* 27 Am.Jur.2d Equity § 136 (1966) (footnotes omitted). The clean hands doctrine, however, “is not one of absolutes and [it] should be applied in the court’s discretion, so as to accomplish its purpose of promoting public policy and the integrity of the courts.” *Id.* (Footnote omitted.) Thus, the fact that a party has engaged in inequitable conduct will not always result in that party being denied relief under the clean hands doctrine.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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“[The clean hands doctrine] is not a judicial strait jacket; it does not require that those who invoke equity should have led blameless lives, or operate so as to repel all sinners from a court of equity, nor does it apply to every unconscientious act of a party [E]quity will consider the conduct of the adversary, the requirements of public policy, and the relation of the misconduct to the subject matter of the suit and to [the] defendant.

....

“... The conduct of a party may be such as to prevent the maxim from being applied at his instance, as where he does not himself come with clean hands, where he has been guilty of conduct more unconscionable or unworthy than that of his opponent, or where he invited or waived the misconduct of which he complains.” 30 C.J.S. Equity § 98 (1965) (footnotes omitted).

The clean hands defense does not require dismissal of Plaintiff's equitable claims, especially the unjust enrichment claim, as a matter of law, because: (1) the claimed improper conduct by Kosman was in relation to his mortgage lender, not Defendant; (2) there are too many unresolved factual issues, especially with respect to the \$31,000.00 Kosmann apparently paid to Gilbride, for the court for the court to properly weigh the conduct of the respective parties on this Motion.

Order on Motion for Summary Judgment, p. 9.

1. Standard of Decision

The decision whether to apply the clean hands doctrine to deny an equitable claim is a matter within this court's discretion. *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004). In making a discretionary determination, this court must: “(1) correctly perceive the issue as one of discretion; (2) act within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reach its decision by an exercise of reason.” *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004).

The standards governing application of the clean hands doctrine are set forth above. “In determining if this doctrine applies a court has discretion to evaluate the relative conduct of both parties and to determine whether the conduct of the party seeking an equitable remedy should, in

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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the light of all the circumstances, preclude such relief. *Curtis v. Becker*, 130 Idaho 378, 941 P.2d 350 (Ct.App.1997).” *Sword v. Sweet*, 140 Idaho at 251, 92 P.3d 492 at 501.

The court has determined that the clean hands doctrine does not preclude Plaintiff from recovering damages for unjust enrichment against Defendant. First, as noted above, the claimed inequitable conduct must occur with respect to the controversy in issue. Here, the inequitable conduct of Plaintiff upon which Defendant relies was directed at Plaintiff’s mortgage lender, GMAC, not to Plaintiff’s entitlement to restitution from Defendant. Second, when evaluating the evidence as to the parties’ conduct, the court cannot conclude that application of the clean hands doctrine in this case would produce an equitable result. Application of the doctrine would allow Defendant a windfall in that he would retain title to the real property at issue, as well as sums paid to him by Plaintiff based upon the unenforceable agreement for re-conveyance of the property.

B. Amount of Unjust Enrichment

Defendant contends that, in the event the court finds that he was unjustly enriched, Defendant is entitled to retain \$6,000.00 of the funds Plaintiff paid Defendant, because:

There was testimony at trial that the house needed repairs and at one point, there was a discussion that at least \$5,000 of the money given by Plaintiff may have been for house repairs. Since the repairs have not yet been made, it would certainly not be inequitable for Defendant to retain at least a portion of the money given to him by Plaintiff, even if it was for the house, for necessary repairs.

[\$1000.00 of the money paid by Plaintiff] was . . . earmarked as a rent deposit.

Defendant’s Post-Trial Memorandum, pp. 8-10.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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As to the \$5,000.00, Defendant's argument misapprehends the nature of Plaintiff's unjust enrichment claim. As set forth previously, Defendant was unjustly enriched because of amounts paid by Plaintiff in reliance on the unenforceable agreement for re-conveyance of the property. In seeking to retain \$5,000.00 of the funds paid by Plaintiff, Defendant now seeks to enforce a part of the agreement it has contended is unenforceable. In essence, Defendant claims that, although the agreement to re-convey is unenforceable, Defendant is entitled to retain a portion of the sums paid by Plaintiff in reliance on that agreement, because the parties agreed, as a condition of that agreement, that a portion of the funds Plaintiff paid would be used for house repairs.

As to the \$1000.00 allegedly "earmarked as a rent deposit," as set forth previously, Defendant unilaterally earmarked those funds as a rent deposit at a time when there was no rental agreement between the parties. The evidence establishes that Plaintiff paid that money to Defendant in furtherance of the unenforceable agreement for re-conveyance of the property.

In light of the foregoing, the court concludes that Plaintiff is entitled to judgment against Defendant in the amount of \$39,990.00, on Count IV of the Amended Complaint.

II. Count V: Fraud

In Count V of the Amended Complaint, Plaintiff seeks damages for fraud. **First Amended Complaint, ¶ 46.**

Nine elements must be proved to sustain an action for fraud: (1) a statement of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent to induce reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) the hearer's right to rely; and (9) consequent and proximate injury. *Lettunich v. Key*

MEMORANDUM DECISION FOLLOWING COURT TRIAL

Bank Nat'l Ass'n, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). The party alleging fraud must plead with particularity the factual circumstances constituting fraud, I.R.C.P. 9(b), and ultimately each of the elements must be proven by clear and convincing evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 518, 808 P.2d 851, 855 (1991).

A. False Statement of Fact

In July 2014, Defendant sought summary judgment dismissing Plaintiff's fraud claim on the basis that Plaintiff could not establish the first two elements set forth above. Due to the requirement that Plaintiff plead his fraud claim with particularity, the court identified and evaluated each of the claimed fraudulent misrepresentations set forth in Plaintiff's Amended Complaint. The court determined that the Amended Complaint identified three statements, in paragraphs 36 and 37. The court also concluded that, based on the evidence, Plaintiff could not succeed on its fraud claim with respect to two of the statements. However, the court determined that, viewing the evidence in a light most favorable to Plaintiff, there were unresolved material issues with respect to one statement identified in paragraph 37: "Defendant represented to Plaintiff that he . . . would transfer the property back to Plaintiff once Plaintiff could either pay off the Defendant's loan or obtain other means to establish credit."

The court also recognized that the statement was not one of existing fact, but, rather, was a forward-looking statement. An action for fraud or misrepresentation will not lie for statements of future events. *Mitchell v. Barendregt*, 120 Idaho 837, 843, 820 P.2d 707, 713 (Ct.App.1991) (citing *Sharp v. Idaho Investment Corp.*, 95 Idaho 113, 122, 504 P.2d 386, 395 (1972)). The law requires the plaintiff to form his or her own conclusions regarding the occurrence of future events. *Id.* An action for fraud cannot be based upon a statement of a future event unless there is

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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clear and convincing evidence that the person making the representation knew, at the time the representation was made, that the future event could not occur. *Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 207, 61 P.3d 557, 564 (2002).

Although the Amended Complaint does not identify the date the alleged statement was made, it is evident from the record, including Plaintiff's testimony, that Plaintiff asserts the statement was made some time prior to September 23, 2012, the date Plaintiff paid \$22,990.00 in cash to Defendant. Plaintiff testified that he paid that money to Defendant in reliance upon Defendant's promise to re-convey the property to Plaintiff. In its Post-Trial Brief, Plaintiff relies on two events that occurred in December of 2012, Defendant contacting Canyon County Code Enforcement regarding violations on the property, and Defendant presenting Plaintiff with a lease agreement, the terms of which Plaintiff found oppressive, as evidence that Defendant did not intend to re-convey the property to Plaintiff at the time Defendant made the representation, prior to September 23, 2012.

However, the court concludes that, at most, the evidence cited by Plaintiff supports an inference that, at some point in time, Defendant decided that he would not agree to transfer the property back to Plaintiff on the terms Plaintiff alleges were set forth in the original statement. The evidence does not establish, especially by clear and convincing evidence, that Defendant did not intend to re-convey the property to Plaintiff at the time he made the alleged promise/statement.

Relevant to this regard is Michelle Phillips' testimony. As the court noted earlier, it finds Ms. Phillips' testimony credible. As also noted previously, Ms. Phillips' testimony indicates that, at least as of October 2012, Defendant represented to her that he intended to assist Plaintiff

MEMORANDUM DECISION FOLLOWING COURT TRIAL

in keeping his home. This testimony, alone, precludes a finding that Defendant did not intend to re-convey the property to Plaintiff on the terms set forth in the alleged statement.

B. Right to Rely

An essential element of the torts of both fraudulent and negligent misrepresentation, whether actual or constructive, is that the recipient's reliance on the representation be justified.

Stewart Title of Idaho, Inc. v. Nampa Land Title Co., 110 Idaho 330, 715 P.2d 1000 (1986).

It is undisputed that, in connection with the sale of the property from Plaintiff to Defendant, both parties executed a "Short Payoff Arms-Length Affidavit" including the following:

There are no agreements, understandings or contracts between the parties that the Borrower will remain in the Mortgage Premises as a tenant or later obtain title or ownership of the Mortgaged Premises, except to the extent that the Borrower is permitted to remain as a tenant on the Mortgaged Premises for a short term, as is common and customary in the market, but no longer than ninety (90) days, in order to facilitate relocation.

There are no agreements, understandings or contracts relating to the current sale or subsequent sale of the Mortgage Premises that have not been disclosed to the Servicer.

Each signatory understands, agrees and intends that the Servicer and Investor are relying upon the statements made in the affidavits as consideration for the reduction of the payoff amount of the Mortgage and agreement to the sale of the Mortgage Premises.

In light of the evidence that both parties executed this Affidavit, and that each knew the other had executed the Affidavit, the court cannot find that Plaintiff had a right to rely on Defendant's alleged statement that he would permit Plaintiff to reside on the property indefinitely and would transfer the property back to Plaintiff at a later date. It is not only the fact that Plaintiff executed the Affidavit that compels this conclusion, but also the fact that Plaintiff knew that Defendant had executed the Affidavit. Since Plaintiff knew that Defendant had

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executed the Affidavit, reliance on the alleged promise/statement would require that Plaintiff assume that Defendant would sign a false document. Such reliance is not justifiable.

Based on the foregoing, the court concludes that Defendant is entitled to judgment dismissing Count V of the Amended Complaint.

Defendant's Counterclaims

I. Breach of Contract

Count I (Breach of Contract) of the Counterclaim alleges:

25. Paragraph 36 of the PSA states that "BUYER shall be entitled to possession on closing."

26. The transaction closed on December 28, 2012.

27. Kosmann's refusal to vacate the Subject Property and to deliver possession of the Subject Property to Gilbride constitutes a material breach of the PSA.

28. As a direct and proximate result of Kosmann's refusal to deliver possession of the Subject Property to Gilbride, Gilbride has been damaged in an amount to be proven at trial. Gilbride's damages are ongoing and include, among other things, the fair market rental value of the Subject Property, plus the cost to remove Kosmann's personal property and effects from the Subject property.

"The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages."

Mosell Equities, LLC v. Berryhill & Co., 154 Idaho 269, 278, 297 P.3d 232, 241 (2013).

If there are two different reasonable interpretations of a contract's language, the contract is ambiguous. *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, ___, 338 P.3d 1204, 1214 (2014). If relevant terms are ambiguous, it is the finder of fact's role to determine the meaning of those ambiguous terms. *Id.*

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A. Breach

“A breach of contract is non-performance of any contractual duty of immediate performance.” *Independence Lead Mines v. Hecla Mining Co.*, 143 Idaho 22, 28, 137 P.3d 409, 415 (2006). More specifically, a breach of contract consists of a “failure, without legal excuse, to perform any promise which forms the whole or part of a contract.” *Id.*

As Defendant correctly notes, Paragraph 38 of the form Purchase and Sale Agreement states:

POSSESSION: BUYER shall be entitled to possession X upon closing

Paragraph 38 provides two boxes regarding possession one stating “upon closing,” which, as indicated, contained an “X,” and one providing for entry of a specified date, which was not checked and the term “n/a” inserted into the locations provided for entry of a date.

However, as the court noted in its August 9, 2013 Order on Motion for Summary Judgment, the Agreement also includes a provision in Paragraph 4 (“OTHER TERMS AND/OR CONDITIONS”), which is not part of the form Agreement, but was added in space provided:

Seller will rent the property back from the buyer for a term of not less than 1 year.

As the court noted in its August 9, 2013 Order, the conflicting provisions render the Agreement ambiguous on the issue of possession. As the trier of fact on Defendant’s Counterclaim, based on the parties’ stipulation during trial, the court determines that the provision in Paragraph 4, providing for Plaintiff to retain possession of the property after closing, more accurately reflects the intent of the parties when they executed the Agreement. Since the provision regarding Plaintiff’s lease of the premises following the sale was added to the Agreement, the court finds that it is better evidence of the parties’ intent regarding possession than the “check the box”

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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provision in Paragraph 38. In addition, the evidence adduced at trial makes it clear that, subsequent to execution of the Agreement, both parties evidenced their intention that Plaintiff would remain in possession of the property, as a tenant, after the closing of the sale.

Accordingly, the court concludes that Defendant has not established that Plaintiff breached the Agreement by failing to deliver possession of the property to Defendant at closing. In light of this, Defendant has failed to prove an essential element of his breach of contract claim.

The court also notes that this conclusion is consistent with the doctrine of merger as applied in Idaho. The evidence before the court establishes that Plaintiff delivered a warranty deed to the property to Defendant at closing. Under Idaho law, "acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed, and any claim for relief must be based on the covenants or agreements contained in the deed, not the covenants or agreements as contained in the prior agreement." *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 382, 414 P. 2d 879, 884 (1966). While there is "a generally recognized exception to the foregoing rule which exception relates to collateral stipulations of the contract, which are not incorporated in the deed," *Id.*, Defendant has not provided any facts or authority indicating that the exception applies to his breach of contract claim for failure to deliver possession. In fact, as the *Jolley* Court stated:

In the absence of fraud, mistake, etc., the following stipulations in contracts for the sale of real estate are conclusively presumed to be merged in a subsequently delivered and accepted deed made in pursuance of such contract, to wit: (1) Those that inhere in the very subject-matter of the deed, such as title, possession, emblements, etc; (2) those carried into the deed and of the same effect; (3) those of which the subject-matter conflicts with the same subject-matter in the deed. In such cases, the deed alone must be looked to in determining the rights of the parties.

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Id., 90 Idaho at 383, 414 P.2d at 884 (quoting *Continental Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1946)).

B. Damages

“The burden is upon the plaintiff to prove not only that it was injured but that its injury was the result of the defendant's breach; both amount and causation must be proven with reasonable certainty.” *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007). “Reasonable certainty” does not mean that damages need to be proven with “mathematical exactitude,” but it does require a plaintiff to prove that damages are not merely speculative. *Id.*

Defendant relies on his testimony at trial to establish that the fair market rental value of the property, for purposes of proving damages:

was \$1,733.00 per month. . . . Plaintiff pointed to the appraisal at trial and argued that it provided a fair rental value was \$1,000.00 per month. (Pl. Ex. 24, p.55). However, the appraisal was for a single family dwelling rent comparison. It is uncontested that the property at issue was more than a single family dwelling; it was a two acre parcel with shops and room for vehicle storage. Plaintiff was in fact using it to run a business. Accordingly, a single family dwelling rent comparison prior to closing is not relevant. Defendant's testimony that the fair rent was \$1,733.00 per month is credible and is supported by the record.

Plaintiff's failure to give Defendant possession of the home at closing has resulted in damages to Plaintiff [sic] in the amount of \$733 per month . . . for 25 months, for a total of \$18,325.

Defendant's Post-Trial Memorandum, pp. 13-14. This establishes that Defendant is relying exclusively on his testimony to prove the fair rental value of the property, as Defendant rejects the value set by the appraisal in the record as “not relevant.”

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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At trial, Plaintiff's counsel examined Defendant with respect to the Residential Rental Agreement (Plaintiff's Exh. 6) Defendant prepared in December 2012, prior to the closing of sale on the property. Defendant testified that the rental payment set forth in the Agreement was \$800.00 bi-weekly, which amounted to \$1,733.00 per month. When asked how he arrived at the \$1,733.00 figure, Defendant testified that he "figured" he was going to have a mortgage payment of approximately \$800.00 to \$900.00 and a similar amount in repairs. When Plaintiff's counsel questioned Defendant about the discrepancy between his rental figure and the fair market value established by the appraisal prepared for his purchase of the property, Defendant stated "it's my rent . . . it's my house" and indicated that he could charge whatever rent he wished for the property. The court also notes that the Agreement is titled Residential Rental Agreement and states that "Tenants shall use the premises for residential purposes only. . . ."

"[I]t is generally recognized that an owner of real property, by reason of that ownership, is presumed to have special knowledge as to its value and is therefore competent to testify in that respect." 31A Am. Jur.2d Expert and Opinion Evidence § 248. However, "The weight of the opinion testimony of an owner of real property as to the value of that property is affected by the extent of his or her knowledge regarding the value of the property, such that where the presumption that an owner of real property has special knowledge as to its value is overcome by his or her own testimony, or other showing of lack of knowledge, any opinion as to the value of the property loses its probative significance and is insufficient to sustain an award. An owner's opinion as to the value of his or her property goes to the weight of the testimony and not to its admissibility." 31A Am. Jur. 2d Expert and Opinion Evidence § 249 (footnotes omitted).

MEMORANDUM DECISION FOLLOWING COURT TRIAL

In applying the foregoing legal principles, the court concludes that Defendant's testimony is insufficient to sustain an award of damages in his favor. It is evident that the \$1,733.00 monthly rent figure to which Defendant testified: (1) was developed when Defendant was not the owner of the property; (2) more importantly, was not based on Defendant's special knowledge of the value of the property, but was based on Defendant's estimation of what his particular costs in relation to the property would be, once he purchased the property; and (3) contrary to Defendant's current contention, was not based on any value attributable to a business use of the property. In fact, the trial testimony of Eric Arthur, former Canyon County Code Enforcement Officer, indicates that, at approximately the same time Defendant drafted the Residential Rental Agreement, Defendant objected to Plaintiff's conduct of a business on the property.

Based on the foregoing, the court concludes that Defendant failed to prove damages, resulting from Plaintiff's occupation of the property after Defendant acquired title, with reasonable certainty.

In light of the above, Plaintiff is entitled to judgment dismissing Count I of the Counterclaim.

II. Ejectment

Count II (Ejectment) of the Counterclaim alleges:

29. Gilbride is the owner of the Subject Property as evidenced by the duly recorded Warranty Deed executed by Kosmann, a copy of which is attached hereto.
30. Kosmann refused to deliver possession of the Subject Property to Gilbride.
31. Gilbride is therefore entitled to a Decree ejecting Kosmann from the Subject Property and delivering possession thereof to Gilbride.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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An action for “ejectment requires proof of (1) ownership, (2) possession by the defendants, and (3) refusal of the defendants to surrender possession.” *Ada County Highway District v. Total Success Investments, LLC*, 145 Idaho 360, 369, 179 P.3d 323, 332 (2008).

The evidence adduced at trial is sufficient to establish Defendant’s right to possession of the property and his right to eject Kosmann from the property.

Accordingly, Defendant is entitled to judgment on Count II of the Counterclaim ejecting Plaintiff from the real property at issue in this action.

III. Unlawful Detainer/Eviction

Count III (Unlawful Detainer/Eviction) of the Counterclaim seeks judgment evicting Plaintiff from the premises pursuant to a Three-Day Notice to Pay Rent or Vacate, dated January 11, 2013.

Defendant’s Post-Trial Memorandum indicates that he is not seeking judgment on this claim: “Defendant’s counterclaims are for breach of contract and ejectment.” **Defendant’s Post-Trial Memorandum, p. 13.**

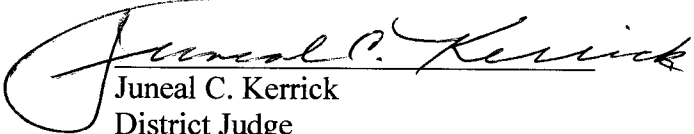
In light of Defendant’s statement, the court’s determination on Defendant’s ejectment claim, and the date of the Notice, the court has determined to dismiss Defendant’s ejectment claim, without prejudice to pursue such claim in accordance with the procedures established in Idaho Code, Title 6, Chapter 3.

On the grounds, and for the reasons stated, IT IS SO ORDERED.

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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Dated this 27th day of March, 2015.


Juneal C. Kerrick
District Judge

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon the following, either by U.S. Mail, first class postage prepaid; by hand delivery; by courthouse basket; or by facsimile copy:

Kevin E. Dinius
Michael J. Hanby II
Dinius Law
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Facsimile: 208-475-0101

James G. Reid
Jennifer R. Mahoney
Kaufman Reid, PLLC
1211 W. Myrtle, Suite 350
Boise, ID 83702
Facsimile: 208-342-4657

Dated this 30 day of March, 2015.

CHRIS YAMAMOTO
Clerk of the District Court

By: Ten
Deputy Clerk

MEMORANDUM DECISION FOLLOWING COURT TRIAL

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FILED
9 0 A.M. 1 P.M.

MAR 30 2015

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,

Plaintiff,

vs.

LEO GILBRIDE,

Defendant.

And Related Counterclaims

JUDGMENT

CV-2013-795-C

JUDGMENT IS ENTERED AS FOLLOWS:

Counts I, II, III and V of the Amended Complaint are DISMISSED, with prejudice;

Plaintiff shall recover the sum of \$30,990.00 against Defendant on Count IV of the
Amended Complaint;

Count I of the Counterclaim is DISMISSED, with prejudice;

On Count II of the Counterclaim, Defendant Leo Gilbride shall have and recover from
Plaintiff David Kosmann possession of the real property located at 1020 W. Homedale Road,

JUDGMENT

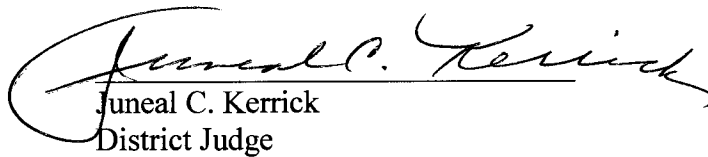
- 1 -

Caldwell, Canyon County, Idaho, legally described as 04-3N-3W SW DUNNS PLAT LOT 6

BLK 1; and

Count III of the Counterclaim is DISMISSED, without prejudice.

DATED this 27 day of March, 2015.


Juneal C. Kerrick
District Judge

JUDGMENT

- 2 -

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon the following, either by U.S. Mail, first class postage prepaid; by hand delivery; by courthouse basket; or by facsimile copy:

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1211 W. Myrtle, Suite 350
Boise, ID 83702
Facsimile: 208-342-4657

Dated this 30 day of March, 2015.

CHRIS YAMAMOTO
Clerk of the District Court

By: TC
Deputy Clerk

JUDGMENT

- 3 -

F I L E D
A.M. 2:50 P.M.

APR 10 2015

CANYON COUNTY CLERK
T WATKINS, DEPUTY

JAMES G. REID, ISB #1372
JENNIFER REID MAHONEY, ISB #5207
KAUFMAN REID, PLLC
1211 W. Myrtle, Suite 350
Boise, Idaho 83702
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
jreid@krlawboise.com
jmahoney@krlawboise.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,	)	Case No. CV13-795C
)	
)	
Plaintiff,)	
	)	DEFENDANT'S MOTION FOR
vs.	)	ATTORNEY FEES AND COSTS
)	
LEO GILBRIDE,)	
)	
Defendant .)	

COMES NOW Defendant, by and through his undersigned counsel, Kaufman Reid, PLLC, and hereby moves the Court for its order granting him attorney fees and costs incurred in the defense of this action.

**I. DEFENDANT IS ENTITLED TO COSTS PURSUANT TO
RULE 68**

Plaintiff filed this action against Defendant on January 25, 2013. Defendant

DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS - 1

made an Offer of Judgment pursuant to Rule 68, Idaho Rules of Civil Procedure, on January 28, 2013, in the amount of \$32,500.00. *See* Offer of Judgment, attached as Ex. B to Aff. of Ron Shepherd.

In performing an analysis under Rule 68, the Court compares the award obtained in the action to the "adjusted award." The adjusted award is defined in the Rule as "(1) the verdict in addition to (2) the offeree's costs under Rule 54(d)(1) incurred before service of the offer of judgment and (3) any attorney fees under Rule 54(e)(1) incurred before service of the offer of judgment." I.R.C.P. Rule 68 (emphasis added). The Offer of Judgment in this case was made **only three days after the Complaint was filed.** The only costs incurred by Plaintiff at that point was a filing fee of \$96.00, and the attorney fees incurred for drafting the Complaint. The award obtained by Plaintiff in this lawsuit was \$30,900.00. Even including an amount for filing fees and reasonable attorney fees for drafting the Complaint, the "adjusted award" is less than the \$32,500.00 Offer of Judgment. Accordingly, Defendant is entitled to costs under Rule 54(e)(1) from January 28, 2013 to present.

II. DEFENDANT IS ENTITLED TO COSTS AND ATTORNEY FEES AS THE PREVAILING PARTY

Defendant is alternatively entitled to an award of costs under Rule 54(d), Idaho Rules of Civil Procedure. Regarding an award of costs, Rule 54(d), provides that "[e]xcept when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." I.R.C.P. 54(d)(1)(A). Rule 54(e)(1) further provides that "[i]n any civil action the court may

award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." I.R.C.P. 54(e)(1). In this case, Defendant is the prevailing party as defined in Rule 54(d)(1)(B), and is entitled to costs and attorney fees.

A. Defendant Is the Prevailing Party

Before a party may be awarded costs or attorney fees pursuant to Rule 54, Idaho Rules of Civil Procedure, the Court must first undertake to determine which, if any, party is the "prevailing party." Idaho Rule of Civil Procedure 54(d)(1)(B) provides as follows with respect to determining prevailing party status:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

In determining the prevailing party for purposes of attorney fees, it is also proper to consider a Rule 68 Offer of Judgment. Specifically, the Idaho Supreme Court has explained:

[W]e [have] determined that it was proper to consider Rule 68 offers of judgment as a factor in a prevailing party analysis . . . offers of judgment "should not be the only, or even most significant, factor in the trial court's prevailing party analysis," but they may be considered.

Crump v. Bromley, 148 Idaho 172, 175, 219 P.3d 1188, 1191 (2009) (quoting *Zenner v. Holcomb*, 147 Idaho 444, 449, 210 P.3d 552, 557 (2009)). Moreover, the Idaho Supreme Court "has stated that, in considering all of the claims involved in the action, a court examines the prevailing party question 'from an overall view, not a claim-by-claim analysis.'" *Crump v. Bromley*, 148 Idaho 172, 174, 219 P.3d 1188, 1190 (2009) (citing *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009)). "Furthermore, the fact that a party receives no affirmative relief does not prohibit it from being deemed the prevailing party." *Id.* (citing *Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003)).

In this case, Plaintiff's complaint and amended complaint stated five causes of action: 1) breach of contract, 2) specific performance, 3) breach of the covenant of good faith and fair dealing, 4) unjust enrichment, and 5) fraud. Judgment was granted in favor of Defendant on the claims for breach of contract, specific performance, breach of the covenant of good faith and fair dealing and fraud. The only claim upon which Plaintiff prevailed was his claim for unjust enrichment. Defendant's Counterclaim was for possession of the real property and additional rent. Defendant prevailed on the claim for possession of the property, and prevailed in part on the claim for rent. He was allowed the sum of \$1,000.00 per month for rent, and the claim was denied above the amount.

In looking at the factors set forth in Rule 54, and in looking at the case as a whole, Defendant is the prevailing party. Plaintiff's claim sought an unspecified amount

of damages for the alleged fraud and breach of contract and also sought an order requiring Defendant to sell the real property back to Plaintiff. Plaintiff's main goal throughout the litigation was to get an order requiring Defendant to sell his house back. Testimony regarding the value of the residence was that it was sold for approximately \$117,000. Thus, the claim for the house was the largest claim in the lawsuit. In the end, Plaintiff was only awarded the \$30,900.00 that Defendant had offered **from the very inception of the lawsuit**. Had Plaintiff accepted the Offer of Judgment, made three days after the Complaint was filed, he would have avoided two years of litigation and a jury trial and Defendant would not have incurred the attorney fees he was forced to pay to keep the home he purchased. Instead, Plaintiff continued to insist he wanted the house back and even amended his Complaint to seek damages for alleged fraud.

In light of the fact that Defendant prevailed upon the major claims in the lawsuit (the claims for breach of contract and possession of the home and fraud), and especially in light of the fact that Defendant had offered to pay back the amount Plaintiff obtained in the unjust enrichment claim at the start of the lawsuit in a Rule 68 Offer of Judgment, Defendant is the prevailing party for purposes of costs and attorney fees.

B. Defendant is Entitled to Attorney Fees Pursuant to I.C. § 12-120(3)

A prevailing party is entitled to an award of attorney fees only if a contract or statute provides for such award. In this respect, Idaho Code section 12-120(3) provides that "[i]n any civil action to recover on . . . any commercial transaction unless

otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee. . . ." I.C. § 12-120(3). A "commercial transaction" is defined as any transaction "except transactions for personal or household purposes." *Id.* The conveyance of real property may constitute a commercial transaction. *See Brown v. Greenheart*, 335 P.3d 1, 12, 2014 Ida. LEXIS 259 (2014); *Watson v. Watson*, 144 Idaho 214, 216, 159 P.3d 851, 853 (2007).

In this case, all of the claims stemmed from a commercial transaction between Plaintiff and Defendant for the sale and alleged repurchase of real property used by Plaintiff as both a residence and a business and purchased by Defendant for investment purposes. At trial, Defendant testified that he owns another residence in which he resides and that his intent was to use the purchased property as a rental. Plaintiff testified that he ran a car trim restoration business out of the property, and while the property also included his residence, Idaho Courts have clearly held that "the existence of a residence on the property does not automatically disqualify a land conveyance from being a commercial transaction." *Brown*, 335 P.3d at 13 (2014) (citing *Watson*, 144 Idaho at 219, 159 P.3d at 856 (holding sale of property was commercial transaction where the land was for both a family retreat and for logging); *Herrick v. Leuzinger*, 127 Idaho 293, 306, 900 P.2d 201, 214 (Ct. App. 1995) (holding lease of property was a commercial transaction where the property was for commercial ranching but a residence was maintained on the property)).

Accordingly, Defendant is entitled to an award of attorney fees pursuant to I.C. §

12-120(3).

Alternatively, Defendant is entitled to an award of attorney fees pursuant to the terms of the Real Estate Purchase and Sale Agreement, which provides as follows:

28. **ATTORNEY'S FEES:** If either party initiates or defends any arbitration or legal action or proceedings **which are in any way connected with this Agreement**, the prevailing party is entitled to recover from the non-prevailing party, reasonable costs and attorney's fees, including such costs and fees on appeal.

(Def. Trial Ex. O, at 7) (emphasis added). This entire lawsuit is connected with the Agreement entered into between the parties on September 24, 2012, for the sale of the real property at issue in this case. Thus, pursuant to the terms of the Agreement, Defendant is entitled to his costs and fees as the prevailing party.

III. Plaintiff Is Not Entitled to Costs or Fees Pursuant to Rule 68

Plaintiff has indicated that he will be filing a motion for costs and fees in this case. However, aside from the fact that the Plaintiff is not the prevailing party as set forth in Section II, above, Plaintiff is not entitled to costs or fees incurred after January 28, 2013, pursuant to Rule 68, Idaho Rules of Civil Procedure, which provides that "[i]f the adjusted award obtained by the offeree is less than the offer, then: (i) the offeree must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after the making of the offer (iii) the offeror shall not be liable for costs and attorney fees awardable under Rules 54(d)(1) and 54(e)(1) of the offeree incurred after the making of the offer." Idaho Rule of Civil Procedure 68 (emphasis added). Because Plaintiff did not obtain an "adjusted award" of more than the offer, under Rule 68, Defendant

DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS - 7

cannot be required to pay Plaintiff's costs or fees incurred after January 28, 2013.

Thus, any motion for costs or attorney fees made by Plaintiff should be denied.

IV. CONCLUSION

Based upon the foregoing, and based upon the information contained in Defendant's Memorandum of Costs and Fees and the Affidavit of Ron Shepherd, Defendant seeks an order awarding his costs and fees incurred in defending this lawsuit.

DATED this 10 day of April, 2015.

KAUFMAN REID, PLLC

By 

James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of April, 2015, a true and correct copy of the foregoing was served upon all parties listed below by:

☒ U. S. mail, postage prepaid
☐ hand delivery

☐ express mail
☐ facsimile

Kevin Dinius
Dinius & Associates
5680 E. Franklin Rd., Suite 130
Nampa, ID 83687


James G. Reid

APR 10 2015

**CANYON COUNTY CLERK
T WATKINS, DEPUTY**

JAMES G. REID, ISB #1372
JENNIFER REID MAHONEY, ISB #5207
KAUFMAN REID, PLLC
1211 W. Myrtle, Suite 350
Boise, Idaho 83702
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
jreid@krlawboise.com
jmahoney@krlawboise.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,

Plaintiff,

vs.

LEO GILBRIDE,

Defendant.

*)

) Case No. CV13-795C

)

)

)

)

AFFIDAVIT OF RON SHEPHERD

)

)

)

)

)

STATE OF IDAHO)
) ss.
COUNTY OF CANYON)

RON SHEPHERD, being first duly sworn upon oath, deposes and states the following:

1. That I am an individual over the age of 18, a resident of the State of Idaho, and have personal knowledge of the facts set forth herein, believing them all to be

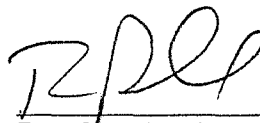
AFFIDAVIT OF RON SHEPHERD - 1

true and correct.

2. That I am an Idaho licensed attorney, and that I represented Leo Gilbride in this matter until James Reid, Kaufman Reid, PLLC, was substituted as counsel of record.
3. That, to the best of my knowledge and belief, the court costs and attorney fees incurred by Leo Gilbride during the time I represented him in this matter, and attached hereto, are true and correct and that said costs and attorney fees were reasonably and necessarily incurred in relation to this action. A line item detail of all court costs and attorney fees incurred by Leo Gilbride during the time I represented him is attached hereto as **EXHIBIT A** and incorporated herein as if fully set forth herein.
4. Attached as **EXHIBIT B** hereto, is a true and correct copy of the Offer of Judgment I sent to Plaintiff on January 28, 2013.

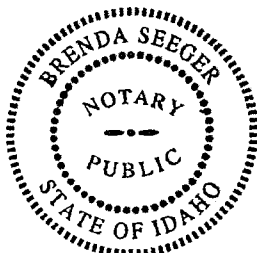
Your affiant says nothing further.


DATED this 8th day of April, 2015.



Ron Shepherd

SUBSCRIBED AND SWORN to before me this 8th day of April, 2015.




NOTARY PUBLIC FOR IDAHO
Residing at Nampa, ID
My commission expires 11/29/2019

AFFIDAVIT OF RON SHEPHERD - 2

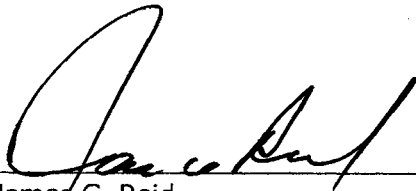
CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of April, 2015, a true and correct copy of the foregoing was served upon all parties listed below by:

☒ U. S. mail, postage prepaid
☐ hand delivery

☐ express mail
☐ facsimile

Kevin Dinius
Dinius & Associates
5680 E. Franklin Rd., Suite 130
Nampa, ID 83687



James G. Reid

EXHIBIT “A”

Client Activity Report (04/02/2015)

Leo Gilbride

13-00231:Gilbr: Real estate dispute (13-012) (Ron Shepherd)

Date	Status	User	Description	Note	Quantity	Price	Total
08/26/2014	Billed	Brenda Seeger		Copy file to CD for Mr. Reid	2.50	40.00	100.00
08/26/2014	Billed	Brenda Seeger		Postage - CDs to James Reid	1.00	1.40	1.40
08/07/2014	Billed	Ron Shepherd		Conference with client	0.40	195.00	78.00
07/31/2014	Billed	Ron Shepherd		Telephone call from/ Telephone call to opposing counsel re: deposition dates and potential settlement	0.10	195.00	19.50
07/10/2014	Billed	Ron Shepherd		Prepare for hearing; Travel to and from courthouse; court appearance - hearing on third MSJ	2.00	195.00	390.00
06/26/2014	Billed	Ron Shepherd		Receive and review Kosmann's memo in opposition to Motion for Summary Judgment; Shepardize/revie w cases cited	0.40	195.00	78.00
06/05/2014	Billed	Ron Shepherd		Email from opposing counsel re: accounting; Email to opposing counsel; Email from opposing counsel	0.10	195.00	19.50
05/20/2014	Billed	Timothy Calkins		Postage - Third Modification for Summary Judgment	1.00	3.08	3.08
05/19/2014	Billed	Ron Shepherd		Finalize memo in support of third MSJ; Draft NOH; Letter to clerk and opposing counsel	0.40	195.00	78.00
05/17/2014	Billed	Ron Shepherd		Email from opposing counsel; Email to opposing counsel; Email to client; Continue legal	3.20	195.00	624.00

research and writing re: Third
MSJ

05/16/2014	Billed	Ron Shepherd	Legal research and writing re: fraud - in support of Third MSJ	1.20	195.00	234.00
04/16/2014	Billed	Ron Shepherd	Email from client; Email to client re: appeal and attorney fee in eviction matter	0.20	195.00	39.00
04/15/2014	Billed	Ron Shepherd	Email from client; Telephone call from client re: eviction memorandum of costs and fees and process going forward, among other things	0.50	195.00	97.50
04/11/2014	Billed	Ron Shepherd	Receive and review Memorandum of Costs and Fees (eviction proceeding)	0.10	195.00	19.50
04/10/2014	Billed	Timothy Calkins	Postage - deposition of Justin McCarthy sent by mail. (to Justin)	1.00	5.05	5.05
04/10/2014	Billed	Ron Shepherd	Telephone call from client re: eviction proceeding and more	0.20	195.00	39.00
04/07/2014	Billed	Ron Shepherd	Telephone call from opposing counsel re: eviction client filed	0.20	195.00	39.00
04/04/2014	Billed	Brenda Seeger	Copy Fee - Motion to Dismiss (107 pgs. documents)	1.00	16.05	16.05
04/04/2014	Billed	Ron Shepherd	Receive and review Kosmann's motion to dismiss and related documents in eviction case client filed	0.10	195.00	19.50
04/02/2014	Billed	Ron Shepherd	Receive and Review Subpoena Duces Tecum Fairway Independent and Canyon County Development; Letter to Dinius	0.20	195.00	39.00
03/27/2014	Billed	Brenda Seeger	M&M Court Reporting - Deposition of Justin McCarthy (March 20, 2014)	1.00	404.74	404.74

03/27/2014	Billed	Brenda Seeger	M&M Court Reporting - Deposition of Michele Phillips (March 20, 2014)	1.00	236.43	236.43
03/20/2014	Billed	Ron Shepherd	Prepare for depositions of Michelle Phillips and Justin McCarthy; Conference with client; Receive and review voluminous documents/emails from McCarthy; Conference with opposing counsel; Conduct/attend depositions for Phillips and McCarthy	8.00	195.00	1560.00
03/09/2014	Billed	Brenda Seeger	Pinnacle Appraisal Services - Appraisal 1020 West Homedale Road, Caldwell	1.00	200.00	200.00
03/06/2014	Billed	Ron Shepherd	Draft supplemental discovery response; Draft disclosure of expert witness; Letter to clerk and opposing counsel	0.40	195.00	78.00
03/05/2014	Billed	Ron Shepherd	Receive and review appraisal from Jason Torpey; Email to Jason Torpey	0.30	195.00	58.50
02/27/2014	Billed	Ron Shepherd	Telephone call to Jess Payne Appraisals; Telephone call to Pinnacle Appraisals re: obtaining opinion re: fair rental value; Review appraisal; Email to Jason Torpey - Pinnacle Appraisals	0.50	195.00	97.50
02/20/2014	Billed	Ron Shepherd	Email from opposing counsel re: notice of termination; Email to client	0.10	195.00	19.50
02/18/2014	Billed	Ron Shepherd	Telephone call from opposing counsel re: notice of eviction client apparently served; Telephone call to client; Letter to client	0.35	195.00	68.25
02/12/2014	Billed	Ron Shepherd	Telephone call from client re: payment received, eviction process, criminal charges in review and more	0.25	195.00	48.75
02/10/2014	Billed	Ron Shepherd	Letter to Dinius re demand for payment	0.10	195.00	19.50

01/14/2014	Billed	Brenda Seeger	Service of Process - Justin McCarthy and Michele Phillips Deposition Subpoenas	1.00	100.00	100.00
01/07/2014	Billed	Ron Shepherd	Draft Stipulation and Order to Release Funds; Letter to opposing counsel	0.30	195.00	58.50
01/03/2014	Billed	Ron Shepherd	Receive and review Plaintiff's Responses to Second Discovery; Telephone call from client	0.70	195.00	136.50
12/18/2013	Billed	Brenda Seeger	Justin McCarthy - Witness Fee (Deposition)	1.00	23.54	23.54
12/18/2013	Billed	Brenda Seeger	Michele Phillips - Witness Fee (Deposition)	1.00	23.39	23.39
12/16/2013	Billed	Ron Shepherd	Draft Motion for Order to Reimburse and Notice of Hearing	0.50	195.00	97.50
12/16/2013	Billed	Ron Shepherd	Draft Subpoena for Deposition (x2) and Notice of Deposition (x2); Letter to opposing counsel	0.40	195.00	78.00
12/10/2013	Billed	Ron Shepherd	Receive and review Letter from Opposing counsel re: payment of \$6000; Letter to Opposing counsel	0.30	195.00	58.50
12/05/2013	Billed	Ron Shepherd	Telephone call from Client	0.20	195.00	39.00
12/04/2013	Billed	Ron Shepherd	Analysis letter to Client	0.50	195.00	97.50
12/03/2013	Billed	Ron Shepherd	Telephone call from Client re: discussion with Angel Smith and eviction for nonpayment	0.10	195.00	19.50
12/03/2013	Billed	Ron Shepherd	Telephone call from Angel Smith re: witness testimony	0.50	195.00	97.50
11/25/2013	Billed	Ron Shepherd	Draft Second Set of Discovery; Draft Notice of Service of Discovery; Letter to Opposing counsel re: payment of funds,	1.20	195.00	234.00

depositions and more; Draft
Proposed Stipulation for
Scheduling and Planning

11/25/2013	Billed	Ron Shepherd	Email from Client; Email to Opposing counsel re: waiving jury trial	0.10	195.00	19.50
11/22/2013	Billed	Ron Shepherd	Receive and review Order Setting Case; Telephone from Client	0.40	195.00	78.00
11/14/2013	Billed	Ron Shepherd	Telephone from Client	0.25	195.00	48.75
11/11/2013	Billed	Ron Shepherd	Draft Request for Trial Setting; Letter to court; Letter to Opposing counsel	0.30	195.00	58.50
11/07/2013	Billed	Ron Shepherd	Prepare for hearing; Travel to and from courthouse; Court Appearance - Motion hearing	2.50	195.00	487.50
11/06/2013	Billed	Ron Shepherd	Telephone from Client	0.20	195.00	39.00
10/31/2013	Billed	Ron Shepherd	Receive and review Plaintiff's Memo in opposition to Motion to Reconsider	0.10	195.00	19.50
10/24/2013	Billed	Ron Shepherd	Prepare for mediation; Travel to and from courthouse; Attend mediation; Legal research; Finalize Memo in support of Motion to Reconsider; Draft Motion to Reconsider and NOH; Letter to Clerk and Opposing counsel	4.50	195.00	877.50
10/17/2013	Billed	Ron Shepherd	Review documents and depositions; Draft Mediation Statement	1.50	195.00	292.50
10/16/2013	Billed	Ron Shepherd	Receive and review Email from Client; Draft Objection to Proposed Order; Draft alternative Proposed Order; Letter to court	0.40	195.00	78.00

10/10/2013	Billed	Ron Shepherd	Continue research and writing re: memo in Support of MSJ; Review pleadings and Affidavits; Finalize Memo; Draft Motion and Affidavit of Leo Gilbride	2.00	195.00	390.00
10/05/2013	Billed	Ron Shepherd	legal research; Begin Draft of Memo in Support of MSJ	1.50	195.00	292.50
09/26/2013	Billed	Ron Shepherd	Draft Response to Second Request for Production; Draft Notice of Service	0.30	195.00	58.50
09/16/2013	Billed	Ron Shepherd	Receive and review Letter from Opposing counsel; Telephone to Client	0.10	195.00	19.50
09/13/2013	Billed	Ron Shepherd	Finalize Amended Counterclaim; Draft Answer to First Amended Complaint; Telephone from Client re: Order on Motion to Deposit Funds	1.00	195.00	195.00
09/13/2013	Billed	Ron Shepherd	Receive and review proposed order re: Deposit of Funds; Letter to Opposing counsel	0.25	195.00	48.75
09/12/2013	Billed	Ron Shepherd	Prepare for hearing; Travel to and from courthouse; Conference with Client; Conference with Opposing counsel; Court Appearance - motion hearing; draft Order Granting Leave to Amend	1.50	195.00	292.50
09/11/2013	Billed	Ron Shepherd	Telephone from Opposing counsel; Telephone to Client; Telephone from Client	0.75	195.00	146.25
09/09/2013	Billed	Ron Shepherd	Telephone from Client	0.20	195.00	39.00
09/06/2013	Billed	Ron Shepherd	Telephone to Client; Draft objection to motion for order to deposit funds	1.00	195.00	195.00
09/05/2013	Billed	Ron Shepherd	Email from Opposing counsel; Email to Opposing counsel; Email to Client (multiple)	0.20	195.00	39.00

08/30/2013	Billed	Ron Shepherd	Legal research; Review citations in Court's Order re Summary Judgment; Begin Drafting Memo in Support of Motion to Reconsider	4.00	195.00	780.00
08/20/2013	Billed	Ron Shepherd	Telephone from Client; Letter to Client	0.30	195.00	58.50
08/18/2013	Billed	Ron Shepherd	Finalize Motion for Leave to Amend; Draft Memo in Support thereof; Draft NOH	0.60	195.00	117.00
08/16/2013	Billed	Ron Shepherd	Draft Request for Trial Setting	0.20	195.00	39.00
08/16/2013	Billed	Ron Shepherd	Telephone from Client	0.20	195.00	39.00
08/15/2013	Billed	Ron Shepherd	Analysis letter to Client	0.30	195.00	58.50
08/14/2013	Billed	Ron Shepherd	Telephone from Opposing counsel re: mediation and status of case	0.20	195.00	39.00
08/13/2013	Billed	Ron Shepherd	Legal research RE: Unlawful Detainer, notice requirements; Begin Motion for Leave to Amend Complaint; Draft Proposed Amended Complaint	1.50	195.00	292.50
08/12/2013	Billed	Ron Shepherd	Receive and review Order On MSJ; Telephone from Client	0.60	195.00	117.00
07/18/2013	Billed	Ron Shepherd	Telephone call from client re status of summary judgment decision	0.15	195.00	29.25
07/17/2013	Billed	Ron Shepherd	Telephone call from opposing counsel re status after hearing, settlement and potential for mediation	0.30	195.00	58.50
07/15/2013	Billed	Brenda Seeger	Transferred from TurboLaw after payment of \$2,242.52 on July 18, 2013	0.10	-0.02	0.00

Billed Total: 54.00 hours, \$11,136.68

Matter Total: 54.00 hours, \$11,136.68

Client Total: 54.00 hours, \$11,136.68

Total: 54.00 hours, \$11,136.68

Hamilton, Michaelson & Hilty, LLP

Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units	Price	Value
1/14/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Initial Office Conference	T	0.7500	195.0000	146.2500
1/15/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review numerous documents provided by client in three-ringed binder plus closing documents; Receive and review email from client and attached Letter from Kevin Dinius; Begin draft of Letter to Kevin Dinius	T	1.0000	195.0000	195.0000
1/16/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Finalize letter to Kevin Dinius	T	0.5000	195.0000	97.5000
1/16/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from Kevin Dinius	T	0.1000	195.0000	19.5000
1/17/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from client; Telephone call to client	T	0.2000	195.0000	39.0000
1/23/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from/Email to opposing counsel; Telephone call from/ Telephone call to opposing counsel; Email to client; Telephone call from client; Email to opposing counsel	T	0.4000	195.0000	78.0000
1/24/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from Kevin Dinius; Email to client; Email from client; Telephone call from client; Email to Kevin Dinius	T	0.4000	195.0000	78.0000
1/28/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review Email from client with Summons and Complaint attached; Receive and review S&C: Telephone call from client; Draft Offer of Judgment and NOA; Letter to opposing counsel	T	0.7500	195.0000	146.2500
1/28/2013		13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Filing Fees	FF	1.0000	66.0000	66.0000

Hamilton, Michaelson & Hilty, LLP

Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

		MatterID/Client Sort				
		Matter Description				
Date	Prof	Narrative	Component Task Code	Units	Price	Value
1/31/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from opposing counsel re: offer of 20K plus payoff of loan; Email to client; Email from opposing counsel; Email to opposing counsel and client	T	0.2000	195.0000	39.0000
2/5/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from client; Telephone call to client	T	0.1000	195.0000	19.5000
2/6/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review check for \$1000 from Kosmann; Telephone call to/Telephone call from client; Letter to opposing counsel	T	0.3500	195.0000	68.2500
2/14/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from client	T	0.2500	195.0000	48.7500
2/14/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Begin draft Answer and Counterclaim; Conference with client; Letter to opposing counsel re: receiving \$1000 payment; Letter to client	T	2.0000	195.0000	390.0000
2/19/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Legal research re: ejectment and writ of assistance; Continue drafting and finalize Answer and Counterclaim	T	1.5000	195.0000	292.5000
2/20/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from/Email to opposing counsel re: settlement and claims made	T	0.2500	195.0000	48.7500
2/20/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Review documents to be disclosed in discovery for relevance/privilege/etc	T	0.7500	195.0000	146.2500
2/25/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from opposing counsel re: deposition dates; Email to client re: same	T	0.1000	195.0000	19.5000

Hamilton, Michaelson & Hilty, LLP

Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

		MatterID/Client Sort				
		Matter Description				
Date	Prof	Narrative	Component Task Code	Units	Price	Value
2/25/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Finalize document review for discovery responses; Draft Written discovery responses	T	1.5000	195.0000	292.5000
2/25/2013	BGS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Scan documents in preparation for disclosing documents in response to Plaintiff's request for production of documents	T	5.0000	50.0000	250.0000
2/26/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review Plaintiff's Request for Trial Setting; Draft Response; Letter to opposing counsel and client re: depositions and the response	T	0.3000	195.0000	58.5000
2/26/2013		13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Postage - Return from Ada County Clerk for issued subpoenas	Postage	1.0000	1.6200	1.6200
2/26/2013		13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Postage - Ada County Clerk of the Court (Issue Subpoenas)	Postage	1.0000	2.1200	2.1200
3/1/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Final review of redacted and bated documents to be disclosed; Finalize written discovery responses; Draft Notice of Service; Letter to clerk, opposing counsel and client	T	0.5000	195.0000	97.5000
3/4/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from client	T	0.1000	195.0000	19.5000
3/6/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Draft Notice of Deposition - David Kosmann	T	0.2000	195.0000	39.0000
3/6/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Draft First Set of Interrogatories, RFP and Request of Admission to Kosmann; Draft Notice of Service; Letter to clerk opposing counsel and client	T	2.0000	195.0000	390.0000

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Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units	Price	Value
3/6/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from/Email to client; Telephone call from client	T	0.1000	195.0000	19.5000
3/7/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Draft Subpoena Duces Tecum to Justin McCarthy and Marc Banner	T	0.3000	195.0000	58.5000
3/12/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review Kosmann's Reply to Counterclaim	T	0.2000	195.0000	39.0000
3/25/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from/Email to client re: judge/jury trial and deposition	T	0.1000	195.0000	19.5000
3/25/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from opposing counsel re: offer to settle; Telephone call to client with offer; Telephone call to opposing counsel rejecting offer	T	0.4000	195.0000	78.0000
3/26/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Travel to/Travel from Dinius' law office; Conference with client; Attend client's deposition	T	3.5000	195.0000	682.5000
3/27/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Emails from/to Client	T	0.1000	195.0000	19.5000
3/28/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from Client	T	0.1000	195.0000	19.5000
3/29/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from/Email to client (multiple)	T	0.1000	195.0000	19.5000
3/29/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email to/Email from client; Telephone call from client	T	0.1000	195.0000	19.5000
3/29/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call to Jeff West	T	0.2000	195.0000	39.0000

Hamilton, Michaelson & Hilty, LLP

Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units	Price	Value
4/1/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review numerous email texts from client; Email to opposing counsel with texts attached	T	0.2000	195.0000	39.0000
4/5/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call to Fire Marshall (msg); Email from/Email to client	T	0.1000	195.0000	19.5000
4/5/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Postage - Client - Deposition of Leo Gilbride	Postage	1.0000	1.7200	1.7200
4/8/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and begin review of documents received from Justin McCarthy	T	0.3000	195.0000	58.5000
4/9/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review audios and documents produced by Plaintiff in discovery	T	1.5000	195.0000	292.5000
4/9/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Letter to opposing counsel; Letter to client re: deposition and more	T	0.2000	195.0000	39.0000
4/10/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Postage - To Client - Plaintiff's Responses to Defendant's First Discovery Requests	Postage	1.0000	1.7200	1.7200
4/26/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Letter to Opposing Counsel re available dates for deposition of David Kosmann	T	0.2000	195.0000	39.0000
5/1/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Draft Notice of Taking Deposition; Letter to opposing counsel	T	0.2000	195.0000	39.0000
5/3/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review Notice of Continued Deposition; Letter to opposing counsel; Letter from opposing	T	0.2000	195.0000	39.0000

Hamilton, Michaelson & Hilty, LLP

Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

		MatterID/Client Sort				
		Matter Description	Component			
Date	Prof	Narrative	Task Code	Units	Price	Value
		counsel				
5/9/2013		13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Deposition of Leo Gilbride transcript (THIS WAS PAID THROUGH TRUST APPLICATION ON MAY 9, 2013)	Transcript	1.0000	187.1100	187.1100
5/10/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Prepare for Dave Kosmann's deposition; Conduct deposition	T	5.2000	195.0000	1,014.0000
5/13/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from Andy, Caldwell Fire Department	T	0.1000	195.0000	19.5000
5/13/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from Kevin Dinius with letter to Title One attached; Email to client	T	0.1000	195.0000	19.5000
5/13/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from opposing counsel; Telephone call to client; Email to opposing counsel with settlement proposal; Telephone call to opposing counsel; Letter to Title One	T	1.0000	195.0000	195.0000
5/15/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from Cameron McFadden - Title One	T	0.1000	195.0000	19.5000
5/15/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Legal research re: parole evidence, statute of fraud, unclean hands and more in preparation for filing motion for summary judgment	T	1.3000	195.0000	253.5000
5/20/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Receive and review audio recording of telephone conversation between Kosmann and Justin McCarthy	T	0.3000	195.0000	58.5000
5/22/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from opposing counsel with settlement proposal; Email to client	T	0.1000	195.0000	19.5000

Hamilton, Michaelson & Hilty, LLP

Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

		MatterID/Client Sort				
		Matter Description				
Date	Prof	Narrative	Component Task Code	Units	Price	Value
5/22/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from client	T	0.2000	195.0000	39.0000
5/22/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Review Kosmann's deposition; Begin draft of memo in support of MSJ	T	1.5000	195.0000	292.5000
5/22/2013		13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE M&M Court Reporting - Deposition Transcript of David Kosmann (May 10, 2013)	Transcript	1.0000	403.3700	403.3700
5/23/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Continue drafting memo re: MSJ	T	4.0000	195.0000	780.0000
5/30/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Email from/Email to client	T	0.1000	195.0000	19.5000
6/6/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Continue legal research and drafting of Motion for Summary Judgment	T	3.5000	195.0000	682.5000
6/10/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Review and edit Memo re: MSJ; Email to client	T	0.3000	195.0000	58.5000
6/11/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Final draft and review of Memorandum in Support of MSJ; Check citations; Draft Affidavit of Gilbride; Telephone call from client	T	1.5000	195.0000	292.5000
6/11/2013		13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Postage - Motion for Summary Judgment to Opposing Counsel	Postage	1.0000	3.3200	3.3200
6/17/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from client; Letter to opposing counsel re: resetting MSJ hearing	T	0.2000	195.0000	39.0000

Hamilton, Michaelson & Hilty, LLP
Transactions Listing Report

Search Description:

Search for: 13-012 Search by: Matter ID Stage: (all) Type: (all)

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units	Price	Value
6/26/2013	RS	13-012 / Gilbride, Leo J. MATTER TRANSFERRED TO RSL, EFFECTIVE Telephone call from Client	T	0.2000	195.0000	39.0000
			GrandTotal	55.0000		9,106.9800

EXHIBIT “B”

RON R. SHEPHERD
HAMILTON, MICHAELSON & HILTY, LLP
Attorneys at Law
1303 12th Avenue Road
PO Box 65
Nampa, ID 83653-0065
Telephone: (208) 467-4479
Facsimile: (208) 467-3058
ISB No. 6593
rshepherd@nampalaw.com

Attorneys for Defendant

**IN THE DISTRICT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

DAVID KOSMANN,	)	Case No. CV-2013-795-C
)	
Plaintiff,)	
	)	OFFER OF JUDGMENT
v.)	
)	
LEO GILBRIDE,)	
)	
Defendant.)	

The above-named Defendant, Leo Gilbride, by and through his counsel of record, Ron R. Shepherd of the law firm of Hamilton, Michaelson & Hilty, LLP, and pursuant to Rule 68 of the Idaho Rules of Civil Procedure, hereby offers that judgment be entered against Defendant, Leo Gilbride, in the sum of \$32,500.00 and in favor of Plaintiff, David Kosmann, for all claims recoverable, including attorneys fees awardable under Idaho Rule of Civil Procedure 54(e)(1) and costs available under Idaho Rule of Civil Procedure 54(d)(1), which have accrued up to the date of this offer.

This offer of judgment shall remain open for 14 days from the date it was served on Plaintiff.

DATED this 28th day of January, 2013

HAMILTON, MICHAELSON & HILTY, LLP



RON R. SHEPHERD
Attorneys for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that on the 28th day of January, 2013, I caused a true and correct copy of the foregoing OFFER OF JUDGMENT to be served by the method indicated below, and addressed to the following:

Kevin E. Dinius
Michael J. Hanby, II
DINIUS LAW
5680 East Franklin Road, Suite 130
Nampa, ID 83687

() U.S. Mail, Postage Prepaid
() Certified Mail/Return Receipt
() Hand Delivered
(☒) Facsimile 475-0101
() Email: *kdinius@diniuslaw.com*
mhanby@diniuslaw.com



RON R. SHEPHERD

F I L E D
A.M. 2:53 P.M.

APR 10 2015

**CANYON COUNTY CLERK
T WATKINS, DEPUTY**

JAMES G. REID, ISB #1372
JENNIFER REID MAHONEY, ISB #5207
KAUFMAN REID, PLLC
1211 W. Myrtle, Suite 350
Boise, Idaho 83702
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
jreid@krlawboise.com
jmahoney@krlawboise.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

	*	
	*	
	*	
DAVID KOSMANN,	)	Case No. CV13-795C
)	
)	
Plaintiff,)	
	)	DEFENDANT'S MEMORANDUM OF
vs.	)	COURT COSTS AND ATTORNEY FEES
)	
LEO GILBRIDE,)	
)	
Defendant .)	

COMES NOW Defendant, by and through its attorneys of record, Kaufman Reid PLLC, and **PURSUANT TO** Rules 54(d) and 54(e) of the IDAHO RULES OF CIVIL PROCEDURE hereby submits this Memorandum of Court Costs and Attorney Fees. The court costs and attorney fees incurred by Defendant incident to the above-titled action are as follows:

MEMORANDUM OF COURT COSTS AND ATTORNEY FEES - 1

Item of Cost	Amount
Court filing fees	\$ 66.00
Service fees	\$ 100.00 - service of McCarthy and Phillips deposition subpoenas \$ 87.00 -service of McCarthy trial subpoena
Witness fees (\$20/day) and travel expense (\$.30/mile)	\$23.54 - McCarthy depo. witness fee and mileage \$23.39 - Phillips depo. witness fee and mileage \$ 36.66 - Justin McCarthy trial witness fee and mileage
Certified copies	\$
Exhibit expenses (\$500 limit)	\$
Bond premiums	\$
Expert witness fees (\$2,000 limit)	\$
Deposition transcription	\$ 403.37 - deposition of David Kosmann \$ 404.74 - deposition of Justin McCarthy \$ 263.43 - deposition of Michelle Phillips
Deposition copies	\$ 137.01 - copy of Eric Arthur depo. \$ 187.11 - copy of Leo Gilbride depo.
<i>Subtotal - Costs as of Right</i>	\$ 1,732.25
Discretionary Costs	\$
<i>Subtotal - Discretionary Costs</i>	\$
Attorney Fees	\$ 53,980.00 - Kaufman Reid, PLLC \$ 20,243.56 - Ron Shepherd
TOTAL COSTS AND FEES	\$ 75,955.81

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

JAMES G. REID, being first duly sworn upon oath, deposes and states the following:

MEMORANDUM OF COURT COSTS AND ATTORNEY FEES - 2

1. That I am an individual over the age of 18, a resident of the State of Idaho, and have personal knowledge of the facts set forth herein, believing them all to be true and correct.
2. That I am an Idaho licensed attorney employed by the law firm of Kaufman Reid, PLLC.
3. That, to the best of my knowledge and belief, the court costs and attorney fees claimed herein are true and correct and that said costs and attorney fees were reasonably and necessarily incurred in relation to this action. A line item detail of all court costs and attorney fees incurred herein is attached hereto as **EXHIBIT A** and incorporated herein as if fully set forth herein. A line item detail of all court costs and attorney fees incurred by Defendant's prior counsel is attached to the Affidavit of Ron Shepherd, as Exhibit A, and filed herewith.
4. That the court costs and attorney fees claimed herein are claimed in compliance with Rules 54(d) and 54(e) of the IDAHO RULES OF CIVIL PROCEDURE.
5. That Defendant is entitled to an award of court costs as a matter of right, as claimed herein, pursuant to Rule 54(d)(1)(C). The court costs claimed as a matter of right were reasonably and actually incurred and paid by Defendant, and generally consist of filing and service fees, fees for depositions and copies of depositions. Receipts are available for production upon request.
6. That Defendant is entitled to an award of attorney fees, as claimed herein, pursuant to Idaho Code § 12-120(3), and the Real Estate Purchase Agreement between the parties, as is set forth more fully in the Motion for Attorney Fees filed herewith. That the determination of the amount claimed as attorney fees

MEMORANDUM OF COURT COSTS AND ATTORNEY FEES - 3

herein is based upon the time expended in this action and is, in the belief of affiant, fair and reasonable in all respects. The detail attached hereto as **EXHIBIT A** reflects the time and labor expended by counsel and Exhibit A to the Affidavit of Ron Shepherd details the time and labor expended by prior counsel. Undersigned counsel further represents as follows -

- a. James Reid is an attorney with over 42 years of experience and Jennifer Mahoney is an attorney with over 19 years of experience;
- b. The hourly charges for the work performed in this case for James G. Reid, Jennifer Mahoney and Ron Shepherd are reasonable based upon the level of experience of the attorneys, the complexity of issues and the fact that the matter was actually tried to a jury and the Court;
- c. That counsel utilized automated legal research and computer-assisted legal research to prepare the case, but does not separately and independently charge for such research.
- d. That there were numerous motions filed and heard by the Court and that the lawsuit has lasted over two years, up and through a trial;
- e. That the results obtained of a defense verdict after trial on all issues not addressed by the Offer of Judgment filed at the start of that case warrant the fees incurred.

Your affiant says nothing further.

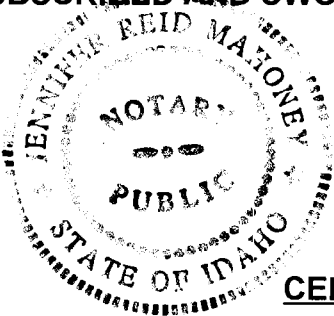
DATED this 10 day of April, 2015.

KAUFMAN REID PLLC

by: James G. Reid

James G. Reid

SUBSCRIBED AND SWORN to before me this 10th day of April, 2015.



Jennifer Mahoney
NOTARY PUBLIC FOR IDAHO

Residing at Mendota

My commission expires 5-22-20

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of April, 2015, a true and correct copy of the foregoing was served upon all parties listed below by:

☒ U.S. Mail, postage prepaid
☐ hand delivery

☐ express Mail
☐ facsimile

Kevin Dinius
Dinius & Associates
5680 E. Franklin Rd., Suite 130
Nampa, ID 83687

James G. Reid
James G. Reid

EXHIBIT “A”

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Client ID 15324.00 GILBRIDE/LEO									
15324.00	08/14/2014	1	A	30	200.00	1.00	200.00	Initial meeting with Leo and James Reid	ARCH
15324.00	08/14/2014	3	A	30	250.00	1.80	450.00	Office conference with Leo and Rose regarding real estate litigation; begin review of litigation file	ARCH
15324.00	08/21/2014	1	A	30	200.00	1.00	200.00	Analysis of potential new case	ARCH
15324.00	08/22/2014	1	A	30	200.00	1.70	340.00	Meet with Leo and Rose	ARCH
15324.00	08/22/2014	3	A	30	250.00	2.00	500.00	Office conference with Leo and Rose regarding case status, possible representation	ARCH
15324.00	08/25/2014	3	A	30	250.00	2.50	625.00	Office conference with clients; Continue review of client file and Court documents; Office conference with Jennifer Mahoney	ARCH
15324.00	08/25/2014	1	A	30	200.00	0.80	160.00	Review documents regarding discovery; meet with Leo and Angel	ARCH
15324.00	08/26/2014	3	A	30	250.00	1.50	375.00	Telephone conference with Ron Shepherd; prepare Notice of Substitution of Counsel; Telephone conference with Kevin Dinius regarding depositions and Trial settings; Telephone conference with Leo; Prepare letter of engagement	ARCH
15324.00	08/26/2014	3	A	30	250.00	0.40	100.00	Telephone conference with Kevin Dinius regarding deposition, Trial dates	ARCH
15324.00	08/27/2014	3	A	30	250.00	1.70	425.00	Correspondence to Leo regarding engagement; Correspondence to Ron Shepherd regarding substitution; Continue analysis of discovery depositions	ARCH
15324.00	08/28/2014	3	A	30	250.00	1.00	250.00	Telephone conference with Leo; Telephone conference with Court Clerk; Prepare Notice of Status Conference; Receive and review Amended Deposition Notice for McArthur; Correspondence to Leo	ARCH
15324.00	08/29/2014	3	A	30	250.00	0.40	100.00	Prepare Notice of Status Conference and serve Plaintiff's attorney	ARCH
15324.00	08/29/2014	3	A	30	250.00	2.50	625.00	Continue review and analysis of pleadings, emails and depositions	ARCH
15324.00	09/04/2014	3	A	30	250.00	0.50	125.00	Status conference	ARCH
15324.00	09/04/2014	3	A	30	250.00	1.30	325.00	Office conference with Leo regarding Eric Arthur deposition; Review materials submitted in support of possible code violations	ARCH
15324.00	09/04/2014	1	A	30	200.00	0.20	40.00	Participate in Scheduling Conference	ARCH
15324.00	09/04/2014	1	A	30	200.00	1.00	200.00	Meet with Leo and prepare for Eric Arthur deposition	ARCH
15324.00	09/15/2014	3	A	30	250.00	1.00	250.00	Preparation for McArthur deposition; Telephone conference with Leo	ARCH
15324.00	09/16/2014	3	A	30	250.00	2.50	625.00	Travel to Nampa; Attend Eric Arthur deposition; Travel to Boise	ARCH
15324.00	09/25/2014	3	A	30	250.00	1.20	300.00	Continue preparation for conference with Leo regarding case status, issues to address	ARCH
15324.00	09/26/2014	3	A	30	250.00	0.80	200.00	Receive and review Arthur deposition	ARCH
15324.00	09/29/2014	3	A	30	250.00	1.30	325.00	Office conference with Leo and Jennifer Mahoney; review exhibits regarding house closing	ARCH
15324.00	09/29/2014	1	A	2	200.00	0.70	140.00	Office conference with Leo and James Reid	ARCH
15324.00	09/30/2014	3	A	30	250.00	1.00	250.00	Continue review and analysis of possible exhibits to use at Trial	ARCH
15324.00	10/30/2014	1	A	2	200.00	0.20	40.00	Telephone conference with Kevin Dinius regarding Pre-Trial Conference and deadlines	ARCH
15324.00	11/05/2014	1	A	30	200.00	0.30	60.00	Review deadlines and prepare for Pretrial Conference	ARCH
15324.00	11/06/2014	1	A	30	200.00	1.60	320.00	Attend Pretrial Conference	ARCH
15324.00	11/06/2014	3	A	30	250.00	0.40	100.00	Telephone conference with office regarding Pretrial Conference	ARCH
15324.00	11/14/2014	1	A	30	200.00	1.20	240.00	Research and analysis of issues regarding validity and legality of buy-back agreements	ARCH
15324.00	11/14/2014	3	A	30	250.00	3.80	950.00	Review Phillips and McCarthy depositions; Prepare outline for cross examinations points; Identify legal issues to research regarding short sales	ARCH
15324.00	11/17/2014	1	A	30	200.00	1.80	360.00	Work on discovery supplementation and exhibits	ARCH
15324.00	11/18/2014	1	A	30	200.00	2.60	520.00	Research and analysis of issues regarding specific performance and short sale fraud	ARCH
15324.00	11/18/2014	3	A	30	250.00	5.30	1,325.00	Review, analyze and identify issues for Trial in Leo's deposition (2.50); Review, analyze and identify issues for Trial in Kosmann deposition (2.80)	ARCH
15324.00	11/21/2014	1	A	30	200.00	1.00	200.00	Review discovery documents and prepare supplemental Discovery Responses; Research mortgage fraud issues	ARCH
15324.00	11/24/2014	1	A	30	200.00	1.50	300.00	Work on exhibits	ARCH
15324.00	11/25/2014	1	A	2	200.00	0.30	60.00	Send out Fourth Supplemental Discovery Responses; Work on fraud instructions	ARCH
15324.00	11/28/2014	3	A	30	250.00	1.00	250.00	Continue Trial preparation	ARCH
15324.00	12/01/2014	3	A	30	250.00	0.80	200.00	Continue analysis of issues for trial	ARCH
15324.00	12/01/2014	1	A	30	200.00	0.60	120.00	Analysis of issues regarding proof of illegality and potential jury instructions	ARCH
15324.00	12/02/2014	3	A	30	250.00	1.50	375.00	Continue analysis of witness depositions, prior	ARCH

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount	Ref #
Client ID 15324.00 GILBRIDE/LEO								
15324.00	12/02/2014	3	A	30	250.00	2.50	625.00	pleadings; Preparation for conference with Leo Office conference with Leo; Continue identification of exhibits and trial preparation ARCH
15324.00	12/02/2014	1	A	30	200.00	2.00	400.00	Trial and exhibit preparation and meet with Leo ARCH
15324.00	12/03/2014	3	A	30	250.00	0.60	150.00	Receive and review Plaintiff's additional discovery requests; review Scheduling Stipulation ARCH
15324.00	12/03/2014	1	A	30	200.00	2.00	400.00	Work on exhibits and exhibit list; Attempt to locate witnesses Maria & Tina ARCH
15324.00	12/04/2014	3	A	30	250.00	0.30	75.00	Office conference with Jennifer Mahoney regarding response to Plaintiff's Supplemental Discovery Requests ARCH
15324.00	12/08/2014	1	A	30	200.00	0.60	120.00	Work on jury instructions ARCH
15324.00	12/09/2014	3	A	30	250.00	0.70	175.00	Receive and review documentation regarding car parts ARCH
15324.00	12/09/2014	1	A	30	200.00	0.30	60.00	Review photos for discovery supplementation ARCH
15324.00	12/19/2014	3	A	30	250.00	1.50	375.00	Continue work on Jury Instructions, Witness List, Exhibit List and Trial preparations ARCH
15324.00	12/22/2014	1	A	30	200.00	3.40	680.00	Work on Jury Instructions and Exhibits; Supplemental Discovery Responses; Meet with Leo regarding Trial preparation ARCH
15324.00	12/22/2014	3	A	30	250.00	2.00	500.00	Trial preparation ARCH
15324.00	12/22/2014	3	A	30	250.00	4.50	1,125.00	Office conference with Leo and Jennifer Mahoney; Review of initial jury instructions; review and identify additional exhibits; continue Trial preparations ARCH
15324.00	12/23/2014	1	A	30	200.00	2.00	400.00	Work on Jury Instructions and Special Verdict Form ARCH
15324.00	12/23/2014	3	A	30	250.00	1.30	325.00	Continue work on proposed Jury Instructions ARCH
15324.00	12/23/2014	3	A	30	250.00	1.20	300.00	File Supplemental Discovery; Continue Trial preparations ARCH
15324.00	12/26/2014	3	A	30	250.00	2.50	625.00	Finalize and file Defendant's Witness List, Possible Exhibits and Jury Instructions; Continue Trial preparations ARCH
15324.00	12/29/2014	3	A	30	250.00	1.30	325.00	Continue Trial preparation; Review depositions and exhibits regarding GMAC issues and valuations of car parts ARCH
15324.00	12/30/2014	1	A	30	200.00	4.70	940.00	Review Plaintiff's proposed Instructions and Pre-Trial brief; Draft Pre-Trial Memorandum ARCH
15324.00	12/30/2014	3	A	30	250.00	3.00	750.00	Continue preparation for Trial; Receive and review Plaintiff's Witness List, Exhibit List and Memorandum ARCH
15324.00	12/30/2014	3	A	30	250.00	3.50	875.00	Continue Trial preparation; Telephone conference with Leo; Listen to recording; Receive correspondence from Plaintiff's attorney; Respond to same; Review and edit Pre-Trial Memorandum; Correspondence to Leo ARCH
15324.00	12/31/2014	1	A	30	200.00	1.70	340.00	Prepare responses to Second Set of Discovery; Letter to Dinius regarding Discovery supplementation; Edit Trial Brief ARCH
15324.00	12/31/2014	3	A	30	250.00	1.50	375.00	Telephone conference with Leo; Correspondence to Plaintiff's Counsel regarding exhibits; File and serve Pre-Trial Brief; Serve responses to Discovery ARCH
15324.00	01/02/2015	1	A	2	200.00	0.20	40.00	Prepare Supplemental Discovery Responses with Photos ARCH
15324.00	01/02/2015	3	A	2	250.00	0.30	75.00	Receive 2nd set of pictures and prepare Supplemental Discovery Responses ARCH
15324.00	01/02/2015	3	A	2	250.00	1.20	300.00	Continue Trial preparation ARCH
15324.00	01/02/2015	3	A	2	250.00	1.50	375.00	Began preparation of witness outline for Leo; Telephone conference with Leo ARCH
15324.00	01/05/2015	3	A	2	250.00	2.00	500.00	Continue preparation of outlines for Trial testimony ARCH
15324.00	01/05/2015	3	A	2	250.00	3.70	925.00	Continue Trial preparation ARCH
15324.00	01/06/2015	1	A	2	200.00	0.40	80.00	Analysis of issues re: fraud and parole evidence rule ARCH
15324.00	01/06/2015	3	A	2	250.00	1.50	375.00	Continue Trial preparation; Telephone conference with Leo ARCH
15324.00	01/07/2015	1	A	2	200.00	4.00	800.00	Review Kosmann deposition and work on Kosmann examination; Pre-trial preparation ARCH
15324.00	01/07/2015	3	A	2	250.00	0.60	150.00	Begin identification of exhibits to use in Kosmann class exam ARCH
15324.00	01/07/2015	3	A	2	250.00	5.00	1,250.00	Trial preparation; Telephone conference with Leo; Listen to recording; work on Kosmann cross examination, edit and revise McCarthy cross examination ARCH
15324.00	01/08/2015	1	A	2	200.00	1.50	300.00	Trial preparation; Witness outlines ARCH
15324.00	01/08/2015	3	A	2	250.00	0.50	125.00	Prepare for Pre-trial conference ARCH
15324.00	01/08/2015	3	A	2	250.00	1.30	325.00	Complete preparation of 1st draft of Kosmann cross examination ARCH
15324.00	01/08/2015	3	A	2	250.00	2.00	500.00	Work on cross examination for balance of Plaintiff's witnesses; Receive and review Plaintiff's Motion in Limine and argument; Telephone conference with Leo ARCH
15324.00	01/09/2015	3	A	2	250.00	2.50	625.00	Appearance for Pre-trial; Attend Pre-trial; Conference with Plaintiff's Counsel re: Stipulations ARCH

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount	Ref #
Client ID 15324.00 GILBRIDE/LEO								
15324.00	01/12/2015	1	A	2	200.00	5.00	1,000.00	Respond to Motion in Limine; Draft Affidavit in Opposition to Motion in Limine; Telephone conference with Plaintiff's Counsel re: Trial exhibits; Review Plaintiff's trial exhibits ARCH
15324.00	01/12/2015	3	A	30	250.00	1.30	325.00	Continue work on response to Motion in Limine; Continue work on Kosmann cross-examination; Continue work on exhibits ARCH
15324.00	01/12/2015	3	A	30	250.00	1.30	325.00	Telephone conference with Plaintiff's counsel regarding witnesses and exhibits (.60); Review Plaintiff's proposed exhibits (.70) ARCH
15324.00	01/13/2015	1	A	2	200.00	0.50	100.00	Prepare Affidavit in Opposition to Motion in Limine; Edit Brief ARCH
15324.00	01/13/2015	3	A	30	250.00	1.00	250.00	Continue Trial preparation ARCH
15324.00	01/13/2015	3	A	30	250.00	1.40	350.00	Review and edit Memorandum in Opposition to Motion in Limine; Correspondence to Plaintiff's counsel, Leo; Prepare outline for argument ARCH
15324.00	01/19/2015	3	A	2	250.00	1.00	250.00	Meeting with Randy Gipson and Stewart Billings ARCH
15324.00	01/20/2015	1	A	2	200.00	1.00	200.00	Trial preparation re: Justin McCarthy ARCH
15324.00	01/20/2015	3	A	2	250.00	2.00	500.00	Continue Trial preparation ARCH
15324.00	01/21/2015	3	A	2	250.00	1.70	425.00	Work on Jury Voir Dire; Prepare for hearing on Motion in Limine ARCH
15324.00	01/21/2015	3	A	2	250.00	3.50	875.00	Travel to Caldwell; Appear and present argument at hearing; Travel to Boise; Telephone conference with Leo; Continue Trial preparation ARCH
15324.00	01/21/2015	1	A	2	200.00	0.80	160.00	Work on Voir Dire and assist in preparation for Motion in Limine hearing ARCH
15324.00	01/22/2015	3	A	2	250.00	6.20	1,550.00	Continue Trial preparation; Meet with Leo and Angel; Telephone conference with Leo ARCH
15324.00	01/22/2015	1	A	2	200.00	3.20	640.00	Meet with Leo and Angel regarding trial preparation; work on Justin McCarthy questions; work on opening statement ARCH
15324.00	01/23/2015	3	A	2	250.00	3.50	875.00	Continue Trial preparation ARCH
15324.00	01/23/2015	1	A	2	200.00	2.70	540.00	Trial preparation and work on supplemental Brief ARCH
15324.00	01/26/2015	3	A	2	250.00	0.70	175.00	Receive and review Court's Order regarding Motion in Limine; Correspondence to Leo ARCH
15324.00	01/26/2015	3	A	2	250.00	5.00	1,250.00	Continue Trial preparation ARCH
15324.00	01/26/2015	1	A	2	200.00	4.80	960.00	Work on Supplemental Brief; Trial preparation; Supplemental Jury Instructions and Special Verdict form; Analysis on Plaintiff's Brief regarding legality issues and cases cited ARCH
15324.00	01/27/2015	3	A	2	250.00	10.00	2,500.00	Trial - Day 1 ARCH
15324.00	01/28/2015	3	A	2	250.00	10.00	2,500.00	Trial - Day 2 ARCH
15324.00	01/28/2015	1	A	30	200.00	9.00	1,800.00	Attend Trial ARCH
15324.00	01/29/2015	3	A	2	250.00	4.00	1,000.00	Trial - Day 3 ARCH
15324.00	01/29/2015	1	A	30	200.00	3.00	600.00	Attend Trial ARCH
15324.00	02/02/2015	3	A	2	250.00	0.80	200.00	Review offer of Judgment; office conference with Jennifer Mahoney regarding final argument; telephone conference with Leo regarding settlement options ARCH
15324.00	02/05/2015	1	A	2	200.00	1.30	260.00	Research issues regarding hearing; work on post trial brief ARCH
15324.00	02/06/2015	3	A	2	250.00	1.50	375.00	Research and review; Work on findings of fact and memorandum regarding remaining claims ARCH
15324.00	02/09/2015	1	A	2	200.00	2.70	540.00	Work on post trial memorandum ARCH
15324.00	02/09/2015	3	A	2	250.00	0.60	150.00	Telephone conference with Mike H. regarding settlement offer; Telephone conference with Leo; ARCH
15324.00	02/10/2015	1	A	2	200.00	3.50	700.00	Work on post trial memorandum. Finding of fact and conclusion of law ARCH
15324.00	02/10/2015	3	A	2	250.00	1.00	250.00	REview and revise and edit draft post trial memorandum; correspondence to Leo regarding the same ARCH
15324.00	02/10/2015	3	A	2	250.00	1.00	250.00	Begin review and analysis of proposed findings of fact and conclusions of law; correspondence to Leo ARCH
15324.00	02/11/2015	1	A	2	200.00	0.80	160.00	Review post trial and findings and make final edits ARCH
15324.00	02/11/2015	3	A	2	250.00	1.00	250.00	Review, revise, and edit proposed findings of fact and conclusions of law; telephone conference with Leo regarding the same; office conference with Jennifer Mahoney ARCH
15324.00	02/16/2015	3	A	2	250.00	1.20	300.00	Receive and review Plaintiff's proposed findings and brief; Telephone conference with Leo; Correspondence regarding missing pages from memorandum ARCH
15324.00	02/17/2015	1	A	2	200.00	0.50	100.00	Review and analysis of Pl. post trial brief and proposed findings and office conference with Jim Reid regarding same ARCH
15324.00	03/17/2015	3	A	2	250.00	0.30	75.00	Check court repository; Telephone conference with Leo regarding case status, meeting issue. ARCH
15324.00	03/30/2015	1	A	2	200.00	3.30	660.00	Review and analysis of court's decision; research ARCH

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmnt # Rate	Hours to Bill	Amount	Ref #
Client ID 15324.00 GILBRIDE/LEO								
							attorney for issues; office conference with Leo; research issues regarding trespass and malicious prosecution	
15324.00	03/30/2015	3	A	2	250.00	1.80	450.00 Receive and review memorandum decision and judgment (.8); telephone call with Leo (.2); conference with JRM regarding possession, attorney fees and costs (.4); receive and review Motion to Reconsider (.4).	ARCH
15324.00	03/30/2015	3	A	2	250.00	1.30	325.00 Telephone call with Leo and JRM regarding costs and fees, compliance with judgment, possible motion to reconsider; correspondence to Plaintiff's attorney regarding vacating property.	ARCH
15324.00	03/31/2015	1	A	2	200.00	1.00	200.00 Review issues regarding eviction; research writ of restitution; Conference with Kevin Dinius	ARCH
15324.00	03/31/2015	3	A	2	250.00	0.60	150.00 Correspondence with JRM; telephone conference with Leo regarding possession issues and costs and fees; correspondence to Leo regarding Motion to Reconsider.	ARCH
15324.00	03/31/2015	3	A	2	250.00	0.80	200.00 Telephone call with Kevin Dinius; telephone call with Leo; receive and review correspondence from Dinius; correspondence to Leo regarding possession; telephone call with Leo.	ARCH
15324.00	04/01/2015	3	P	2	250.00		0.00	9
15324.00	04/01/2015	3	P	2	250.00		0.00	10
Subtotal for Fees					Billable	232.60	53,980.00	
15324.00	09/29/2014	3	A	30			137.01 Pd to M & M Court Reporting for deposition of Eric Arthur	ARCH
15324.00	10/15/2014	3	A	30			137.01 Pd to M & M Court Reporting for deposition of Eric Arthur	ARCH
15324.00	11/06/2014	3	A	30			22.60 Pd to Jennifer Mahoney for roundtrip mileage to and from Canyon Court for Pre-Trial Conference	ARCH
15324.00	01/12/2015	3	A	15			20.00 Pd to Justin McCarthy for witness fee	ARCH
15324.00	01/12/2015	3	A	15			16.66 Pd to Justin McCarthy for one-way mileage to Canyon County Courthouse	ARCH
15324.00	02/05/2015	3	A	15			87.00 Pd. Tri-County Process Serving for service of Subpoena to Justin McCarthy	ARCH
Subtotal for Expenses					Billable	0.00	420.28	
15324.00	12/04/2014	3	A	28	0.150		36.30 Copy Charges	ARCH
Subtotal for Advances					Billable	0.00	36.30	
15324.00	08/31/2014		A	1			4,350.00 PAYMENT RECEIVED - THANK YOU - Transfer from Trust	ARCH
15324.00	10/01/2014		A	1			2,917.04 PAYMENT RECEIVED - THANK YOU - Transferred from Trust	ARCH
15324.00	11/24/2014		A	1			176.98 PAYMENT RECEIVED - THANK YOU	ARCH
15324.00	12/02/2014		A	1			4,326.59 PAYMENT RECEIVED - THANK YOU - ROA - TRUST ACCOUNT	ARCH
15324.00	01/06/2015		A	1			7,500.00 PAYMENT RECEIVED - THANK YOU - DEPOSITED FROM TRUST	ARCH
15324.00	02/02/2015		A	1			20,000.00 PAYMENT RECEIVED - THANK YOU - ROA - TRUST ACCOUNT	ARCH
15324.00	03/02/2015		A	1	6		13,105.97 PAYMENT RECEIVED - THANK YOU - ROA: Trust Account Leo Gilbride	ARCH
15324.00	04/02/2015		P	1			2,060.00 PAYMENT RECEIVED From Trust - THANK YOU	2
Subtotal for Payments					Billable Payments	0.00	0.00 54,436.58	
Total for Client ID 15324.00					Billable Payments	232.60	54,436.58 GILBRIDE/LEO REAL ESTATE LITIGATION	
GRAND TOTALS								
					Billable Payments	232.60	54,436.58 54,436.58	

FILED
A.M. 5:50 P.M.

APR 27 2015

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101
ISB Nos. 5974, 7997
kdinius@diniuslaw.com
mhanby@diniuslaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,	)	CASE NO. CV13-795C
)	
Plaintiff,	)	MEMORANDUM IN OPPOSITION
	)	OF DEFENDANT'S MOTION FOR
-VS-	)	ATTORNEY FEES AND COSTS
)	
LEO GILBRIDE,)	
)	
Defendant.)	

COMES NOW, Plaintiff David Kosmann, by and through his attorneys of record, the law firm of DINIUS & ASSOCIATES, PLLC, and hereby submit his *Memorandum in Opposition to Defendant's Motion for Attorney Fees and Costs*.

A. Standard of Review

In Idaho, we adhere to the 'American Rule' which requires that the parties bear their own fees absent statutory authorization or a contractual right. *Great Plains Equipment, Inc. v.*

MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS - 1

Northwest Pipeline Corp., 132 Idaho 754, 979 P.2d 627 (1999) (citing *Idaho Dept. of Law Enforcement v. Kluss*, 125 Idaho 682, 684, 873 P.2d 1336, 1338 (1994)).

The Idaho Rules of Civil Procedure entitle the prevailing party in a civil action to receive costs and attorney fees when those fees are provided for by statute or contract. Idaho Rules of Civil Procedure 54(d)(1)(A); Idaho Rules of Civil Procedure 54(e)(1). Determination of the prevailing party for purposes of awarding costs and attorney fees is within the sound discretion of the trial court. *Decker v. Homeguard Sys.*, 105 Idaho 158, 161, 666 P.2d 1169, 1172 (Ct. App. 1983); Idaho Rules of Civil Procedure 54(d)(1)(B).

However, in making its determination the trial court must consider the result of the action in relation to the relief sought by the respective parties, whether there were multiple claims or issues, and the extent to which each party prevailed upon each issue or claim. *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983); Idaho Rules of Civil Procedure 54(d)(1)(B).

B. Defendant is not a prevailing party

The term "prevailing party" is defined by Rule 54(d)(1)(B) of the Idaho Rules of Civil Procedure. This Rule provides the following:

[i]n determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issues or claims.

In light of this language, the Idaho Court of Appeals has instructed trial courts to "examine (1) the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues; and (3) the extent to which either party prevailed on each issue or claim." *Freeman & Co. v. Bolt*, 132 Idaho 152, 162, 968 P.2d 247 (Ct. App. 1998) (quotations omitted).

Based on the outcome of this case, Defendant cannot be considered a prevailing party. In his Amended Complaint, the Plaintiff asserted five causes of action: (1) breach of contract; (2) specific performance; (3) breach of the implied covenant of good faith and fair dealing; (4) unjust enrichment; (5) fraud. Defendant Counterclaimed with claims breach of contract and ejectment. By order of this Court, Plaintiff prevailed on his unjust enrichment claim resulting in a money judgment against Defendant in the amount of \$30,990.00. Plaintiff also prevailed on Defendant's breach of contract claim. Consequently, Defendant is not a prevailing party.

C. Idaho Code § 12-120 is inapplicable to this case because it cannot be said that a commercial transaction was the gravamen of the lawsuit

Idaho Code § 12-120(3) provides, in pertinent part, as follows:

In any civil action to recover on an open account...and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The term, "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes.

Idaho courts use a two part test to determine whether attorney fees are proper under this section: (1) there must be a commercial transaction that is integral to the claim; and (2) the commercial transaction must be the basis upon which recovery is sought. *Brooks v. Gigray Ranches*, 128 Idaho 72, 78, 910 P.2d 744, 750 (1996). Indeed, "It has long been held that '[t]he critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute a basis on which the party is attempting to recover.'" *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.* 136 Idaho 466, 471, 36 P.3d 218, 223 (2001), citing *Bingham v. Montane Resource Associates*, 133 Idaho at 426, 987 P.2d at 1041 (1999).

In determining the *amount* of attorney fees, the court is vested with discretion. *DeWills Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (1984). When considering the amount of attorney fees to be awarded under Idaho Code § 12-120, the court must consider the factors set forth in I.R.C.P. 54(e)(3). *Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct. App. 1986).

In this case, the only statute cited by Defendant for his claim of attorney's fees is Idaho Code § 12-120(3). Because the causes of action in the case do not constitute a commercial transaction, the claim for attorney's fees must be denied.

Idaho Code § 12-120(3) provides that in any civil action to recover on any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fees. I.C. § 12-120(3). A "commercial transaction" is any transaction except transactions for personal or household purposes. *Id.* The commercial transaction must be "between the prevailing party and the party from whom that party seeks fees." *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 778, 264 P.3d 400, 417 (2011) (quoting *Soignier v. Fletcher*, 151 Idaho 322, 327, 256 P.3d 730, 735 (2011)). "In order for a transaction to be commercial, **each party to the transaction must enter the transaction for a commercial purpose.**" *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012) (emphasis added). The conveyance of real property may constitute a commercial transaction. *See Watson v. Watson*, 144 Idaho 214, 216, 159 P.3d 851, 853 (2007).

First, the real estate transaction cannot be considered to have been entered for a commercial purpose. Plaintiff testified repeatedly that the purpose for entering into the transaction was to save his home. While there was testimony that Plaintiff restored car trim on the property, Plaintiff's primary occupation is that of an airline pilot. The fact that he used the income from his restoration activities to get by while not working as a pilot is clearly ancillary to the transaction.

Further, Defendant cannot demonstrate that he entered the transaction for a commercial purpose. On February 14, 2014, Defendant posted a Thirty Day Notice to vacate the premises on Plaintiff's Property. That Notice stated that "I will use property as my primary residence." *Plaintiff's Trial Exhibit 19* (emphasis added). It makes no mention of Defendant's intent to operate a business on the Property. In short, Defendant failed to demonstrate that the transaction was entered for a commercial purpose.

Next, Defendant claims that the Real Estate Purchase and Sale Agreement entitles him to fees. This argument fails because Defendant is not the prevailing party, as demonstrated above. Further, it is clear that given this Court's finding regarding Defendant's credibility, a substantial amount of time and effort was consumed in overcoming Defendant's false car parts story. This is not a part of the Real Estate Purchase and Sale Agreement. Thus, Defendant's contention that "the entire lawsuit" connected with the Agreement is misplaced. As a result, Defendant is not entitled to attorney's fees.

D. The amount of Attorney's Fees claimed is excessive and unreasonable in light of Defendant's false testimony regarding car parts

What constitutes a "reasonable" fee is a discretionary determination for the trial court, to be guided by the criteria of I.R.C.P. 54(e)(3). *Kelly v. Hodges*, 119 Idaho 872, 876, 811 P.2d 48, 52 (Ct. App. 1991). The criteria include the time and labor required and any other factor which the court deems appropriate in the particular case. The court need not "blindly accept the figure advanced by [an] attorney." *See Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App., 1985). Thus, an attorney cannot spend his or her time extravagantly and expect to be compensated by the party who has sanctions imposed. *Id.*

Here, the Court recognized that throughout the case, and even at trial, the Defendant argued that the \$30,990.00 he received from Plaintiff was not for the down payment and closing

costs associated with the Property. Instead, Defendant consistently claimed that the money received was for an unrelated "car parts" deal. The Court concluded that Defendant's story for car parts was not credible stating the following:

The court does not find Defendant's testimony and arguments regarding the car parts to be credible. Just as the evidence failed to support Plaintiff's claim that the parties had an enforceable contract for re-conveyance of the property from Defendant to Plaintiff, the evidence does not support the existence of an agreement for the sale of car parts, much less that the \$30,990.00 Plaintiff paid to Defendant between September and December 2012 was in furtherance of such an agreement.

...
Memorandum Decision Following Court Trial, pp. 6-7 (emphasis added).

Clearly a substantial amount of time and effort was consumed in overcoming Defendant's false car parts story. In no way does Defendant take this into account when requesting fees. Given the adverse credibility determination, Defendant should not be rewarded by a grant of attorney's fees and costs.

E. Rule 68 does not entitle Defendant to costs and does not prevent Plaintiff from requesting fees and costs

Finally, Defendant argues that I.R.C.P. 68 entitles him to costs and prevents Plaintiff from requesting attorney's fees and costs. That Rule states in pertinent part:

b) In cases involving claims for monetary damages, any costs under Rule 54(d)(1) awarded against the offeree must be based upon a comparison of the offer and the "adjusted award." **The adjusted award is defined as (1) the verdict in addition to (2) the offeree's costs under Rule 54(d)(1) incurred before service of the offer of judgment and (3) any attorney fees under Rule 54(e)(1) incurred before service of the offer of judgment.** Provided, in contingent fee cases where attorney fees are awardable under Rule 54(e) (1), the court will pro rate the offeree's attorney fees to determine the amount incurred before the offer of judgment in reaching the adjusted award.

If the adjusted award obtained by the offeree is less than the offer, then:

(i) the offeree must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after the making of the offer;

(ii) the offeror must pay those costs of the offeree, as allowed under Rule 54(d)(1), incurred before the making of the offer; and

(iii) the offeror shall not be liable for costs and attorney fees awardable under Rules 54(d)(1) and 54(e)(1) of the offeree incurred after the making of the offer.

I.R.C.P. 68 (emphasis added).

The Offer of Judgment in the amount of \$32,500.00 was made three days after the Complaint was filed and discovery was drafted and ready for service. As demonstrated by Plaintiff's Motion for Attorney's fees, Plaintiff had incurred \$4,353.75 by the time the offer of judgment was served which must be taken into account in adjusting Plaintiff's award as of the date of the Offer of Judgment. After adjusting Plaintiff's award, as of January 28, 2013, Plaintiff's award should be \$35,352.75 – which exceeds the Offer of Judgment. As a result, Defendant is not entitled to costs and Plaintiff is not precluded from obtaining attorney's fees and costs.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendant's Motion for Attorney's Fees and Costs in full.

DATED this 27th day of April, 2015.

DINIUS LAW

By: 

Kevin E. Dinius

Michael J. Hanby II

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 27th day of April, 2015, a true and correct copy of the above and foregoing document was served upon the following by:

James G. Reid

KAUFMAN REID, PLLC

1211 W Myrtle St, Ste 350

Boise, ID 83702



US Mail



Overnight Mail



Hand Delivery



Facsimile - No. 342-4657


for DINIUS LAW

Kevin E. Dinius
Michael J. Hanby II
DINIUS LAW
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Telephone: (208) 475-0100
Facsimile: (208) 475-0101
ISB Nos. 5974, 7997
kdinius@diniuslaw.com
mhanby@diniuslaw.com

Attorneys for Plaintiff/Appellant

FILED
A.M. 355 P.M.

JUN 02 2015

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,

Plaintiff/Appellant,

-vs-

LEO GILBRIDE,

Defendant/Respondent.

CASE NO. CV13-795C

NOTICE OF APPEAL

Fee Category: L-4

Fee: \$129.00

TO: THE ABOVE NAMED RESPONDENT, LEO GILBRIDE, AND THE CLERK OF THE
ABOVE-ENTITLED COURT NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, DAVID KOSMANN, appeals against the above-named Respondent to the Idaho Supreme Court from the final order entered in the above-entitled action on the March 30, 2015, Honorable Juneal C. Kerrick presiding.

2. Appellant has a right to appeal to the Idaho Supreme Court, and the judgment

described in Paragraph 1 above are appealable under and pursuant to Rule 11(a)(1), of the Idaho Appellate Rules.

3. A preliminary statement of the issues on appeal which the Appellant then intends to assert in the appeal; provided any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal:

3.1 Whether the Court erred in granting Defendant Summary Judgment on Counts I and III V of Plaintiff's Complaint;

3.2 Whether the Court erred in its Memorandum Decision following Court trial granting Defendant judgment on Count V of Plaintiff's Amended Complaint;

3.3 Whether the Court erred in denying Plaintiff's Amended Motion to Reconsider and to Amend Findings and Conclusions of the Memorandum Decision and Judgment; and,

3.4 Whether the Court erred in granting Count II of Defendant's counterclaim and awarding Defendant possession of the real property located at 1020 W. Homedale Road, Caldwell, Idaho.

4. Has an order been entered sealing all or any portion of the record? No. If so, what portion? N/A

5. (a) Is a reporter's transcript requested?

Yes.

(b) The Appellant requests the preparation of the following portions of the reporter's transcript:

(1) The entire reporter's standard transcript as defined in I.A.R. 25(a), in compressed format, of the trial before the district court on January 27-29, 2015;

6. The Appellant requests the following documents be included in the clerk's record

in addition to those automatically included under Rule 28, I.A.R.:

6.1 Defendant's Motion for Partial Summary Judgment – filed on or about June 11, 2013;

6.2 Memorandum in Support of Defendant's Motion for Partial Summary Judgment – filed on or about June 11, 2013;

6.3 Affidavit of Ron R. Shepherd – filed on or about June 11, 2013;

6.4 Affidavit of Leo Gilbride – filed on or about June 11, 2013;

6.5 Affidavit of Michele Phillips – filed June 27, 2013;

6.6 Opposition to Defendant's Motion for Partial Summary Judgment – filed June 27, 2013;

6.7 Affidavit of David Kosmann in Support of Opposition to Defendant's Motion for Partial Summary Judgment – filed June 27, 2013;

6.8 Affidavit of Kevin E. Dinius in Support of Opposition to Defendant's Motion for Partial Summary Judgment – filed June 27, 2013;

6.9 Reply Brief in Support of Defendant's Motion for Partial Summary Judgment – filed July 5, 2013;

6.10 Order on Motion for Summary Judgment – filed August 9, 2013;

6.11 Motion for an Order to Deposit Funds – filed September 5, 2013;

6.12 Affidavit of Kevin E. Dinius in Support of Motion for an Order to Deposit Funds – filed September 5, 2013;

6.13 Defendant's Second Motion for Partial Summary Judgment – filed October 10, 2013;

6.14 Memorandum in Support of Defendant's Second Motion for Partial Summary Judgment – filed October 10, 2013;

- 6.15 Affidavit of Leo Gilbride – filed October 10, 2013;
- 6.16 Opposition to Defendant’s Second Motion for Partial Summary Judgment – filed October 24, 2013;
- 6.17 Memorandum in Support of Motion to Strike and Disregard Certain Testimony of Leo Gilbride – filed October 24, 2013;
- 6.18 Defendant’s Motion for Partial Reconsideration – filed October 25, 2013;
- 6.19 Memorandum in Support of Defendant’s Motion for Partial Reconsideration – filed October 25, 2013;
- 6.20 Opposition to Defendant’s Motion for Partial Reconsideration – filed October 31, 2013;
- 6.21 Order Denying Defendant’s Second Motion for Partial Summary Judgment and Motion for Partial Reconsideration – filed November 14, 2013;
- 6.22 Order to Deposit Funds – filed November 14, 2013;
- 6.23 Defendant’s Third Motion for Partial Summary Judgment – filed May 21, 2014;
- 6.24 Affidavit of Ron R. Shepherd in Support of Defendant’s Third Motion for Partial Summary Judgment – filed May 21, 2014;
- 6.25 Memorandum in Support of Defendant’s Third Motion for Partial Summary Judgment – filed May 21, 2014;
- 6.26 Opposition to Defendant’s Third Motion for Partial Summary Judgment – filed June 26, 2014;
- 6.27 Declaration of David Kosmann in Support of Opposition to Defendant’s Third Motion for Partial Summary Judgment – filed June 26, 2014;
- 6.28 Order on Defendant’s Third Motion for Partial Summary Judgment – filed

July 24, 2014;

6.29 Plaintiff's Pre-Trial Brief – filed December 23, 2014;

6.30 Defendant's Pre-Trial Memorandum – filed December 31, 2014;

6.31 Declaration of Kevin E. Dinius in Support of Plaintiff's Motion in Limine – filed January 8, 2015;

6.32 Plaintiff's Motion in Limine – filed January 8, 2015;

6.33 Defendant's Response to Plaintiff's Motion in Limine – January 13, 2015;

6.34 Affidavit of Counsel in Opposition to Plaintiff's Motion in Limine – January 13, 2015;

6.35 Order on Plaintiff's Motion in Limine – January 26, 2015;

6.36 Defendant's Supplemental Pre-Trial Memorandum – filed January 26, 2015;

6.37 Plaintiff's Supplemental Pre-Trial Brief – filed January 26, 2015;

6.38 Declaration of Kevin E. Dinius in Support of Plaintiff's Supplemental Pre-Trial Brief – filed January 26, 2015;

6.39 Declaration of Cameron McFadden – filed January 26, 2015;

6.40 Defendant's Post-Trial Memorandum – filed February 13, 2015;

6.41 Defendant's Proposed Findings of Fact and Conclusions of Law – filed February 13, 2015;

6.42 Plaintiff's Post-Trial Brief – filed February 13, 2015;

6.43 Plaintiff's Proposed Findings of Fact and Conclusions of Law – filed February 13, 2015;

6.44 Plaintiff's Motion for Reconsideration – filed March 30, 2015;

6.45 Plaintiff's Amended Motion to Reconsider and to Amend Findings and

Conclusions of the Memorandum Decision and Judgment – filed April 10, 2015;

6.46 Memorandum in Support of Plaintiff's Amended Motion to Reconsider and to Amend Findings and Conclusions of the Memorandum Decision and Judgment – filed April 10, 2015;

6.47 Order on Plaintiff's Motion to Amend Findings – filed April 21, 2015.

7. I certify:

7.1 That a copy of this notice of appeal has been served on the reporter;

7.2 That the clerk of the district court will be paid the estimated fee of preparation of the reporter's transcript within the time required by rule after notice to Appellant of the amount of the estimated fee;

7.3 That the estimated fee for preparation of the clerk's record will be paid within the time required by rule after notice to Appellant of the amount of estimated fee;

7.4 That the appellate filing fee has been paid; and,

7.5 That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 2nd day of June, 2015.

DINIUS LAW

By:  _____

Kevin E. Dinius

Michael J. Hanby II

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 2nd day of June, 2015, a true and correct copy of the above and foregoing document was served upon the following by:

James G. Reid
KAUFMAN REID, PLLC
1211 W Myrtle St, Ste 350
Boise, ID 83702

☒
☐
☐
☐

US Mail
Overnight Mail
Hand Delivery
Facsimile - No. 342-4657

Kathy Klemetson
Court Reporter for the Honorable Juneal C. Kerrick
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

☒
☐
☐
☐

US Mail
Overnight Mail
Hand Delivery
Facsimile - No.


for DINIUS LAW

F I L E D
A.M. 4:23 P.M.

JUN 18 2015

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID A. KOSMANN,

Plaintiff,

vs.

LEO GILBRIDE,

Defendant.

CV-2013-795-C

**ORDER ON MOTIONS
TO DISALLOW COSTS
AND FEES**

INTRODUCTION

Plaintiff David Kosmann's First Amended Complaint and Demand for Jury Trial, filed August 14, 2009, included five claims for relief against Defendant Leo Gilbride: Count One: Breach of Contract; Count Two: Specific Performance; Count Three: Breach of the Covenant of Good Faith and Fair Dealing; Count Four: Unjust Enrichment; and Count Five: Fraud. The claims arose out of Kosmann's sale of a parcel of real property, located in Canyon County, to Gilbride and an alleged oral contract or promise by Gilbride to reconvey the property to Kosmann.

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 1 -

ORIGINAL

By Order, entered August 9, 2013, the court granted Defendant's Motion for Summary Judgment dismissing Counts I and III of the Complaint, which sought damages for breach of contract and breach of the covenant of good faith and fair dealing.

Defendant Leo Gilbride filed his Answer to First Amended Complaint and First Amended Counterclaim on September 17, 2013. The Counterclaim included three counts: (1) Breach of the contract for sale of the property from Kosmann to Gilbride; (2) Ejectment; (3) Unlawful Detainer/Eviction.

On January 27, 2015, the parties commenced a scheduled four-day jury trial before the court.

On January 29, 2015, at the conclusion of Plaintiff's case-in-chief, Defendant moved for an order dismissing the remaining claims asserted against him. The court granted Defendant's motion to dismiss Count Two: Specific Performance, because the evidence did not establish a contract sufficiently definite in its terms to be specifically enforced; reserved decision on the motion to dismiss Count Five: Fraud; and denied the motion to dismiss Count Four: Unjust Enrichment.

After the court's determination on Defendant's motion to dismiss, the parties jointly stipulated to and requested that the remainder of the trial take place before the court without a jury. The court agreed to this request.

The court trial concluded on January 29, 2015.

On February 13, 2015, the parties filed the following with the court: (1) Plaintiff's Post-Trial Brief; (2) Plaintiff's Proposed Findings of Fact and Conclusions of Law; (3) Defendant's

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 2 -

Post Trial Memorandum; and (4) Defendant's Proposed Findings of Fact and Conclusions of Law. The court deemed the matter submitted for decision on February 13, 2015.

On March 30, 2015, the court entered its Memorandum Decision Following Court Trial and a Judgment: (1) dismissing Counts I, II, III and V of the Amended Complaint and Count I of the Counterclaim, with prejudice; (2) dismissing Count III of the Counterclaim without prejudice; (3) awarding Plaintiff \$30,990.00 on Count IV of the Amended Complaint; and (4) awarding Defendant possession of certain real property on Count II of the Counterclaim.

On April 21, 2015, the court entered its Order denying Plaintiff's Motion to Amend Findings.

Both parties now seek an award of costs and attorney fees, as the prevailing party in this action. Each party has filed an objection and motion to disallow the other party's claimed costs and fees. A hearing was held on the respective motions on June 11, 2015. Plaintiff was represented by Mr. Michael Hanby. Defendant was present and was represented by Mr. James Reid. The court considered the arguments of counsel and the applicable law, then reserved ruling pending the issuance of a written decision.

DEFENDANT'S MOTION TO DISALLOW

According to his Memorandum in Support of Plaintiff's Motion for Attorney Fees and Costs, Plaintiff seeks an award of:

- | | |
|-------------------------|---------------------|
| 1. Costs as of Right: | \$ 1,447.47 |
| 2. Discretionary Costs: | \$ 2,165.90 |
| 3. Attorney Fees: | <u>\$ 90,652.50</u> |

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 3 -

Total: \$94,265.87

Plaintiff's Motion cites Idaho Code sections 12-120 and 12-121 as the statutory bases authorizing an award of his attorney fees in this action.

I. PREVAILING PARTY

I.R.C.P. 54(d)(1) authorizes the court to award costs to the prevailing party in an action. Similarly, I.R.C.P. 54(e)(1) authorizes an award of reasonable attorney fees to the prevailing party or parties in an action, when authorized by any statute or contract. Therefore, in order to recover his costs and/or attorney fees in this action, Plaintiff must establish that he is the prevailing party.

A. Standard of Decision

A trial court's determination regarding whether a party prevailed in an action is a matter of discretion. I.R.C.P. 54(d)(1)(B); *Shore v. Peterson*, 204 Idaho 1114, 1125, 204 P.3d 1114, 1125 (2009). As noted previously, in making a discretionary determination, this court must: (1) correctly perceive the issue as one of discretion; (2) act within the outer boundaries of that discretion and consistently with the applicable legal standards; and (3) reach its determination by an exercise of reason. *Id.*, 146 Idaho at 915.

The boundaries of this court's discretion, in determining whether a party prevailed in this action, are established by the language of Rule 54(d)(1)(B) which states: "In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 4 -

prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.”

“In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed ‘in the action.’ That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.” *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). “Avoiding liability is a significant benefit to a defendant.” *Id.* “In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff.” *Id.*

B. Analysis

In the exercise of its discretion, the court determines that Plaintiff is not a prevailing party, for purposes of an award of costs pursuant to I.R.C.P. 54(d)(1) and attorney fees. Defendant prevailed on the primary issue in this litigation: whether Plaintiff was entitled to specific performance of, or damages for Defendant’s breach of, the alleged oral contract for re-conveyance of the subject property. While Plaintiff did prevail on his unjust enrichment claim, that claim provided limited alternative relief when Plaintiff failed to establish the existence of an enforceable agreement for re-conveyance. Plaintiff did prevail on Defendant’s breach of contract claim, but that claim involved the same issue as Plaintiff’s unjust enrichment claim: whether Plaintiff, having failed to establish the existence of an enforceable agreement for re-conveyance of the property, was entitled to the return of certain sums paid to Defendant.

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 5 -

While it is not necessary to the court's determination on this issue, the court also notes that Defendant's Rule 68 Offer of Judgment in the amount of \$32,500.00, more than Plaintiff recovered on his unjust enrichment claim, weighs in favor of the court's conclusion. *See Zenner v. Holcomb*, 147 Idaho 444, 449 (2009) ("This Court has held that offers of settlement, including offers of judgment, should be considered in determining the final judgment or result of the action in relation to the relief sought. *See Polk v. Larrabee*, 135 Idaho 303, 313, 17 P.3d 247, 257 (2000). Although offers of judgment may be considered, we have cautioned that they should not be the only, or even most significant, factor in the trial court's prevailing party analysis. *Id.*).

In light of this determination, the court concludes that Plaintiff has not demonstrated his entitlement to an award of costs or attorney fees, pursuant to Idaho Code sections 12-120 or 12-121.

II. I.R.C.P. 37(c)

Although not raised in his Motion, Plaintiff's Memorandum in Support of Plaintiff's Motion for Attorney Fees and Costs seeks an award of "attorney fees and costs as a result of Defendant's failure to admit the falsity of the car parts story and failure to admit that he was unjustly enriched" pursuant to I.R.C.P. 37(c).

Rule 37(c) states, in relevant part:

(c) Expenses on Failure to Admit. If a party fails to admit ... the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves ... the truth of the matter, the requesting party may apply to the court **for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.** The court shall make the order unless it finds that ... (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

(emphasis added).

Plaintiff contends that “I.R.C.P. 37(c) entitled Plaintiff to his attorney’s fees and costs for proving these claims. Plaintiff is entitled to \$94,265.87 for disproving the false car parts story and for proving unjust enrichment.”

Since Plaintiff has requested the full amount of the costs and attorney fees incurred in this action on his claim for expenses, the court concludes that Plaintiff has failed to comply with Rule 37(c), by proving the “reasonable expenses incurred” in proving matters Defendant failed to admit. As Plaintiff states in his Memorandum in Support, “a substantial amount of time and effort was consumed in overcoming Defendant’s false car parts story.” By Plaintiff’s own admission, all of the costs and attorney fees Plaintiff incurred in this action were not attributable to Defendant’s failure to admit. In addition, having presided over numerous pretrial motions and the trial in this case, the court can safely state that the majority of attorney fees incurred in this action by both parties were attributable to Plaintiff’s efforts to prove that he had a contractual right to the property at issue, not to Plaintiff’s unjust enrichment claim or Defendant’s breach of contract claim.

PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION FOR COSTS AND FEES

According to his Memorandum of Court Costs and Attorney Fees, Defendant seeks an award of:

- | | | |
|----|--------------------|--------------------|
| 1. | Costs as of Right: | \$ 1,732.25 |
| 2. | Attorney Fees: | <u>\$74,223.36</u> |
| | Total: | \$75,955.81 |

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 7 -

According to his Motion for Attorney Fees and Costs, Defendant seeks an award of attorney fees pursuant to Idaho Code section 12-120(3).

I. PREVAILING PARTY

Based on the analysis set forth above in connection with Defendant's Motion to Disallow Plaintiff's claimed costs and fees, the court concludes, in the exercise of its discretion, that Defendant is the prevailing party in this action, for purposes of an award of costs pursuant to I.R.C.P. 54(d)(1) and attorney fees.

Defendant prevailed on the primary issue in this litigation: whether Plaintiff was entitled to specific performance of, or damages for Defendant's breach of, the alleged oral contract for re-conveyance of the subject property. While Plaintiff did prevail on his unjust enrichment claim, that claim provided limited alternative relief when Plaintiff failed to establish the existence of an enforceable agreement for re-conveyance. Plaintiff did prevail on Defendant's breach of contract claim, but that claim involved the same issue as Plaintiff's unjust enrichment claim: whether Plaintiff, having failed to establish the existence of an enforceable agreement for re-conveyance of the property, was entitled to the return of certain sums paid to Defendant. Defendant not only prevailed on Plaintiff's damage claims for breach of the alleged oral contract to reconvey, but also on Plaintiff's claim for specific performance of that contract, Defendant's own claim for ejectment, and Plaintiff's claim for damages based on fraud.

Again, while it is not necessary to the court's determination on this issue, the court also notes that Defendant's Rule 68 Offer of Judgment in the amount of \$32,500.00, more than

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 8 -

Plaintiff recovered on his unjust enrichment claim, weighs in favor of the court's conclusion, especially since Plaintiff's unjust enrichment claim was his only viable claim for damages.

Based on this fact and the lack of any objection by Plaintiff to the amount of costs claimed by Defendant, the court concludes that Defendant is entitled to an award of costs as of right in the amount of \$ 1,732.25.

II. IDAHO CODE SECTION 12-120(3)

As noted previously, Defendant seeks an award of attorney fees pursuant to Idaho Code section 12-120(3).

Idaho Code section 12-120(3) requires the court to allow a reasonable attorney fee to the prevailing party in a civil action involving a commercial transaction, unless otherwise provided by law. Whether an action involves a commercial transaction, for purposes of section 12-120(3), is a question of law. *Garner v. Povey*, 151 Idaho 462, 469, 259 P.3d 608, 615 (2011).

Section 12-120(3) defines "commercial transaction" as "all transactions except transactions for personal or household purposes." An award of attorney fees under section 12-120(3) is proper when the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover. *Beco Construction Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 726 (2008). The "critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute the basis upon which the party is attempting to recover." *Esser Electric, Inc. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 921, 188 P.3d 854, 863 (2008) (quoting *Ervin Construction Co. v. Van Orden*, 125 Idaho 695, 704, 874 P.2d 506, 515

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

(1993)). Accordingly, a party seeking an award of attorney fees pursuant to section 12-120(3) must establish: (1) the existence of a commercial transaction that is integral to the claim; and (2) the commercial transaction must be the basis upon which recovery is sought. *Garner*, 259 P.3d at 615. “A court is not required to award reasonable attorney fees every time a commercial transaction is connected with a case.” *Bingham v. Montane Resource Associates*, 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999).

Here, the court cannot conclude that Defendant is entitled to an award of attorney fees pursuant to section 12-120(3) arising out of a commercial transaction. The gravamen of the lawsuit was Plaintiff’s claim that a valid oral contract existed between the parties pursuant to which Defendant had agreed to re-convey the property at issue to Plaintiff in order to assist Plaintiff in getting out of his existing mortgage obligation and securing a lower mortgage payment. There is no question that the property at issue was Plaintiff’s primary residence. Based on these facts, the court concludes that Defendant has not established that the gravamen of this action involved a commercial transaction. *See Frontier Development Group, LLC v. Caravella*, 157 Idaho 589, 599, 338 P.3d 1193, 1203 (2014)(“In *Goodspeed v. Shippen*, 154 Idaho 866, 303 P.3d 225 (2013), we considered an appeal arising from the Goodspeeds’ purchase of a home. Noting our decision in *Carrillo*, we stated: “As this transaction lacks the required symmetry of commercial purpose, I.C. § 12–120(3) does not apply.” *Id.* at 874, 303 P.3d at 233. In this case, the Caravellas’ purpose for entering into the agreement with Horn and FDG was to construct a house for their personal use; therefore the transaction was not commercial. For this reason, we do not award attorney fees under Idaho Code section 12–120(3).”).

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 10 -

Here, Defendant contends that he had a commercial purpose in purchasing the property and that Plaintiff ran a business on the property, in addition to residing on the property. However, Defendant's purchase of the property was not at issue in this case. Instead, the gravamen of this case was Plaintiff's claim that there was a contract between the parties for Defendant to re-convey the property to Plaintiff after Defendant purchased it. Based on the record, there is no question that Plaintiff's purpose was to retain his residential property free of his existing mortgage obligation. Plaintiff's purpose was not related to his business on the property. So, even if Defendant had a business purpose, the lack of such a purpose on Plaintiff's part precludes a finding of "the required symmetry of purpose" for application of section 12-120(3).

Defendant's second argument in support of his entitlement to attorney fees under Idaho Code Section 12-120(3) is that the Purchase and Sale Agreement (PSA), pursuant to which he purchased the property, provided for an award of attorney fees. However, the court concludes that Defendant's second argument is unavailing, because the alleged oral agreement for re-conveyance of the property was entirely separate and distinct from the PSA. As the court stated in its August 9, 2013 Order on Motion for Summary Judgment:

II. Plaintiff's Contract Claims

A. Parol Evidence Rule

Defendant first asserts that Plaintiff is precluded, by the parol evidence rule, from introducing any evidence of the alleged oral agreement for reconveyance of the property by the parol evidence rule.

"When a written instrument is complete on its face and is unambiguous, extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, add to, or detract from the instrument's terms." *Kepler-Fleenor v.*

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

Fremont Cnty., 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). Only when a document is ambiguous is parol evidence admissible to discover the drafter's intent. *Id.*

It is not clear to the court that the parol evidence rule bars Plaintiff from presenting proof of the alleged oral agreement to reconvey the property, because it is alleged to have been a separate agreement between the parties. Rather than vary, alter or detract from the written agreement for the sale of the property from Kosmann to Gilbride, the alleged oral agreement actually depends on the validity of the purchase and sale agreement. **Kosmann does not appear to contest that, pursuant to the written purchase and sale agreement he conveyed the property to Gilbride. However, Kosmann claims that the parties entered into a separate oral agreement whereby Gilbride would transfer the property back to Kosmann at a later date.**

(emphasis added).

Defendant essentially adopted the above analysis in his Supplemental Pre-Trial

Memorandum Re: Illegality of Contract, in which Defendant stated:

II. The Property Sale Agreement Is Not Void Due to Alleged Illegality

At the hearing on the motion in limine, Plaintiff suggested that . . . illegality might cut both ways and could impact the underlying contract for the sale of the property. However, the Property Sale Agreement cannot be voided due to illegality for a number of reasons. **First, this action is not one to rescind the purchase and sale agreement and Plaintiff's complaint does not contain such a cause of action.** Plaintiff is not seeking by his complaint to reverse the sale, to do so would put him back in position as owner of the property owing GMAC \$262,000. That is not what he seeks. **Rather, Plaintiff seeks an order upholding the sale, but requiring Defendant to sell him back the property under an alleged oral agreement** (the purpose of which is unlawful as addressed above).

Defendant's Supplemental Pre-Trial Memorandum Re: Illegality of Contract, pp. 5-6 (emphasis added).

In fact, as Defendant also notes in that Memorandum, the only claim in this case involving the PSA was Defendant's counterclaim for breach of contract:

The validity of the Purchase and Sale Agreement comes into play in connection with Defendant's counterclaim for breach of contract, wherein Defendant alleges that

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 12 -

Plaintiff's failure to turn over the property is a breach of the Purchase and Sale Agreement.

Defendant's Supplemental Pre-Trial Memorandum Re: Illegality of Contract, p. 6.

However, as the court explained in its Memorandum Decision Following Court Trial, Defendant did not produce sufficient evidence to prevail on his counterclaim for breach of the PSA because: (1) Defendant failed to establish that Plaintiff breached the PSA by failing to deliver possession of the property to Defendant at closing, based on the express language of the PSA and the merger doctrine; and (2) Defendant failed to prove his damages stemming from the alleged breach.

In short, Defendant did not prevail on the only claim in this case that was based upon the PSA. Accordingly, the PSA cannot afford a basis for this court to award Defendant attorney fees pursuant to Idaho Code Section 12-120(3).

ORDER

Based on the foregoing,

Plaintiff's Motion for Attorney Fees and Costs is DENIED, and Defendant's Motion to Disallow Plaintiff's Claimed Costs and Fees is GRANTED; and, further,

Defendant's Motion for Costs is GRANTED, and Defendant is awarded \$1,732.25 in costs as of right; and, further,

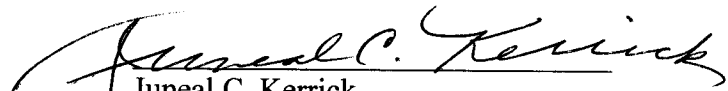
Defendant's Motion for Attorney Fees is DENIED.

IT IS SO ORDERED.

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 13 -

Dated this 18th day of June, 2015.


Juneal C. Kerrick
District Judge

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 14 -

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon the following, either by U.S. Mail, first class postage prepaid; by hand delivery; by courthouse basket; or by facsimile copy:

Kevin E. Dinius
Michael J. Hanby II
Dinius Law
5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687
Facsimile: 208-475-0101

James G. Reid
Kaufman Reid, PLLC
1211 W. Myrtle, Suite 350
Boise, Idaho 83702

Dated this 6-18 day of June, 2015.

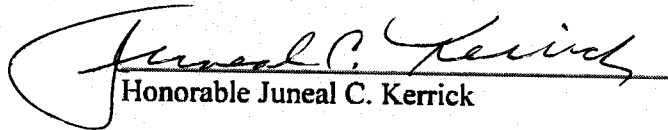
CHRIS YAMAMOTO
Clerk of the District Court

By: 
Deputy Clerk

ORDER ON MOTIONS TO DISALLOW COSTS AND FEES

- 15 -

DATED this 2nd day of July, 2015.


Honorable Juneal C. Kerrick

CERTIFICATE OF SERVICE

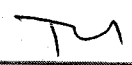
I, the undersigned, hereby certify that on the 2nd day of July, 2015, a true and correct copy of the above and foregoing document was served upon the following by:

James G. Reid
Kaufman Reid, PLLC
1211 W. Myrtle St., Suite 350
Boise, ID 83702

☐ US Mail
☐ Overnight Mail
☐ Hand Delivery
☒ Facsimile 208-342-4657

Kevin E. Dinius
Michael J. Hanby II
Dinius Law
5680 E. Franklin Rd., Suite 130

☐ US Mail
☐ Overnight Mail
☐ Hand Delivery
☒ Facsimile 208-475-0101



Deputy Clerk

JAMES G. REID, ISB #1372
JENNIFER REID MAHONEY, ISB #5207
KAUFMAN REID, PLLC
1211 W. Myrtle, Suite 350
Boise, Idaho 83702
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
jreid@krlawboise.com
jmahoney@krlawboise.com

FILED
10:50 A.M. P.M.

JUL 10 2015

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,
Plaintiff,
vs.
LEO GILBRIDE,
Defendant .

*) Case No. CV13-795C
)
)
)
) DEFENDANT'S NOTICE OF
) CROSS APPEAL
)
)
)

TO: THE ABOVE-NAMED RESPONDENT, David Kosmann, and your
attorney of record; and the Clerk of the above-titled Court:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Leo Gilbride, cross appeals against the
above-named Respondent to the Idaho Supreme Court from the Amended Judgment

NOTICE OF CROSS APPEAL - 1

(including any relevant adverse pre-trial rulings, procedural rulings and evidentiary rulings), entered in the above-titled action on the 2nd day of July, 2015, Honorable Juneal Kerrick, District Judge, presiding.

2. The cross appeal is on both issues of law and fact.

3. The Cross Appellant is represented by James G. Reid and Jennifer Reid Mahoney of Kaufman Reid, PLLC, 1211 W. Myrtle, Suite 350, Boise, ID 83702, telephone (208) 342-4591, email jreid@krlawboise.com and jmahoney@krlawboise.com.

4. The Cross Respondent is represented by Kevin Dinius and Michael Hanby of Dinius & Associates, PLLC, 5680 E. Franklin Rd., Nampa, ID 83687, telephone (208) 475-0100, email kdinius@diniuslaw.com.

5. The party has a right to cross appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

6. Appellants provide the following as a preliminary statement of the issues on cross appeal:

- (a) Did the District Court err in denying Defendant's motion for attorney fees under Idaho Code § 12-120(3), by determining that this action did not involve a commercial transaction?
- (b) Did the District Court err in denying Defendant's motion for attorney fees based upon the Real Estate Purchase and Sale Agreement between the parties?

7. A transcript of the court trial was prepared by the Court Reporter. A copy

of the trial transcript is not requested.

8. The Cross Appellant requests the following documents to be included in the clerk's record, in addition to those automatically included in the Clerk's record pursuant to Rule 28 I.A.R. and in addition to those requested by Cross Respondent in his notice of appeal:

- (a) Defendant's Motion for Attorney Fees and Costs;
- (b) Affidavit of Ron Sheperd;
- (c) Defendant's Memorandum of Court Costs and Attorney Fees;
- (d) Memorandum in Opposition to Defendant's Motion for Attorney Fees and Costs;
- (e) Memorandum in Response to Plaintiff's Objection to Defendant's Motion for Costs and Attorney Fees;
- (f) Order on Motions to Disallow Costs and Fees.

9. I certify:

(a) That a copy of this notice of cross appeal has been served upon the reporter;

(b) That the estimated fee for preparation of the Clerk's record will be paid within the time required by rule after notice to Cross Appellant of the amount of estimated fee;

(c) That the Appellate filing fee has been paid;

(d) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 1 day of July, 2015.

KAUFMAN REID, PLLC

By


James G. Reid

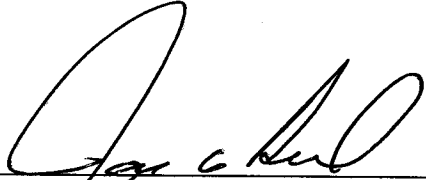
CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of July, 2015, a true and correct copy of the foregoing was served upon all parties listed below by:

☒ U. S. mail, postage prepaid
☐ hand delivery

☐ express mail
☐ facsimile

Kevin Dinius
Dinius & Associates
5680 E. Franklin Rd., Suite 130
Nampa, ID 83687



James G. Reid

CV13-00795

In the Supreme Court of the State of Idaho

FILED
A.M. 2:05 P.M.

JUL 29 2015

DAVID KOSMANN,
Plaintiff-Appellant-Cross Respondent,
v.
LEO GILBRIDE,
Defendant-Respondent-Cross Appellant.

PARTIAL REMITTUR
Supreme Court Docket No. 43296-2015
Canyon County No. CV-2013-795
CANYON COUNTY CLERK
K WALDEMER, DEPUTY

TO: THIRD JUDICIAL DISTRICT, COUNTY OF CANYON.

The Court having entered an Order granting Appellant, David Kosmann's Motion to Dismiss Appeal on July 28, 2015, and having dismissed Appellant David Kosmann's appeal July 28, 2015, therefore;

IT IS HEREBY ORDERED that Appellant, David Kosmann's appeal is dismissed and this appeal shall proceed as to Respondent Leo Gilbride's cross-appeal, and;

IT IS FURTHER ORDERED that the title of this appeal is hereby amended as follows:

DAVID KOSMANN,
Plaintiff-Respondent,
v.
LEO GILBRIDE,
Defendant-Appellant.

DATED this 29 day of July, 2015.

Stephan Kuyper
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
Court Reporter - K. Klemetson
District Judge

PARTIAL REMITTUR - Docket No. 43296-2015

JAMES G. REID, ISB #1372
 JENNIFER REID MAHONEY, ISB #5207
 KAUFMAN REID, PLLC
 1211 W. Myrtle, Suite 350
 Boise, Idaho 83702
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657
jreid@krlawboise.com
jmahoney@krlawboise.com

F I L E D
 A.M. 2:10 P.M.

AUG 11 2015

**CANYON COUNTY CLERK
 C LAKE, DEPUTY**

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,

Plaintiff,

vs.

LEO GILBRIDE,

Defendant .

*)
 *)
 *)

) Case No. CV13-795C

)
)
)
) DEFENDANT'S AMENDED
) NOTICE OF APPEAL
)
)
)

TO: THE ABOVE-NAMED RESPONDENT, David Kosmann, and your
 attorney of record; and the Clerk of the above-titled Court:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Leo Gilbride, appeals against the above-named Respondent to the Idaho Supreme Court from the Amended Judgment

NOTICE OF CROSS APPEAL - 1

(including any relevant adverse pre-trial rulings, procedural rulings and evidentiary rulings), entered in the above-titled action on the 2nd day of July, 2015, Honorable Juneal Kerrick, District Judge, presiding.

The purpose of the Amended Appeal is to request a trial transcript, which had previously been requested by Kosmann in his initial appeal. When Kosmann voluntarily dismissed his Appeal, Appellant Gilbride's Cross Appeal became the only appeal in the case, and it became necessary for Appellant Gilbride to request a copy of the trial transcript.

2. The appeal is on both issues of law and fact.

3. The Appellant is represented by James G. Reid and Jennifer Reid Mahoney of Kaufman Reid, PLLC, 1211 W. Myrtle, Suite 350, Boise, ID 83702, telephone (208) 342-4591, email jreid@krlawboise.com and jmahoney@krlawboise.com.

4. The Respondent is represented by Loren K. Messerly, of Greener Burke, 950 W. Bannock St., Suite 950, Boise, Idaho, 83702, telephone (208) 319-2600, email lmesserly@greenerlaw.com.

5. The party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

6. Appellants provide the following as a preliminary statement of the issues on cross appeal:

- (a) Did the District Court err in denying Defendant's motion for attorney fees under Idaho Code § 12-120(3), by determining that

NOTICE OF CROSS APPEAL - 2

this action did not involve a commercial transaction?

- (b) Did the District Court err in denying Defendant's motion for attorney fees based upon the Real Estate Purchase and Sale Agreement between the parties?

7. A transcript of the court trial was prepared by the Court Reporter. A copy of the trial transcript is requested. Originally, Kosmann had requested a trial transcript be prepared at part of his appeal. When the appeal was voluntarily dismissed, it became necessary for Gilbride to request a copy of the trial transcript.

8. The Appellant requests the following documents to be included in the clerk's record, in addition to those automatically included in the Clerk's record pursuant to Rule 28 I.A.R. and in addition to those requested by Cross Respondent in his notice of appeal:

- (a) Defendant's Motion for Attorney Fees and Costs;
- (b) Affidavit of Ron Sheperd;
- (c) Defendant's Memorandum of Court Costs and Attorney Fees;
- (d) Memorandum in Opposition to Defendant's Motion for Attorney Fees and Costs;
- (e) Memorandum in Response to Plaintiff's Objection to Defendant's Motion for Costs and Attorney Fees;
- (f) Order on Motions to Disallow Costs and Fees.

9. I certify:

(a) That a copy of this amended notice of appeal has been served upon the reporter;

(b) That the estimated fee for preparation of the Clerk's record has

NOTICE OF CROSS APPEAL - 3

been paid and that the estimated fee for the preparation of the trial transcript will be paid within the time required by rule after notice to Appellant of the amount of estimated fee;

(c) That the Appellate filing fee has been paid;

(d) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 11 day of August, 2015.

KAUFMAN REID, PLLC

By


James G. Reid

NOTICE OF CROSS APPEAL - 4

CERTIFICATE OF SERVICE

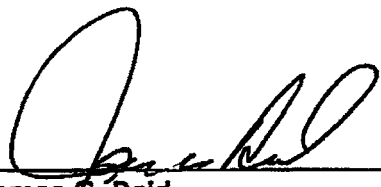
I hereby certify that on the 11 day of August, 2015, a true and correct copy of the foregoing was served upon all parties listed below by:

☒ U. S. mail, postage prepaid
☐ hand delivery

☐ express mail
☐ facsimile

Loren K. Messerly
Greener Burke
950 W. Bannock St., Suite 950
Boise, ID 83702

Kathy Klemetson
Court Reporter for the Honorable Juneal C. Kerrick
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605



James G. Reid

NOTICE OF CROSS APPEAL - 5

In the Supreme Court of the State of Idaho

CV13-00795

FILED
A.M. 2:10 P.M.

SEP 16 2015

CANYON COUNTY CLERK
K WALDEMER, DEPUTY

DAVID KOSMANN,

Plaintiff- Respondent,

v.

LEO GILBRIDE,

Defendant-Appellant.

ORDER RE: PAYMENT OF FEE FOR
TRANSCRIPTS

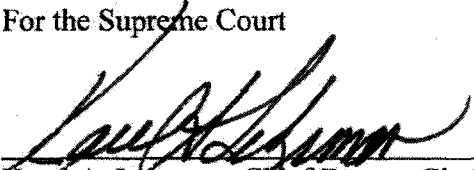
Supreme Court Docket No. 43296-2015
Canyon County No. CV-2013-795

On September 15, 2015, District Court Reporter Kathy J. Klemetson notified this Court that, after written notification being mailed to Appellant counsel regarding the amount due for the transcripts requested, the fee (\$1,430.00) for preparation of the Reporter's Transcripts has not yet been paid. Therefore,

IT HEREBY IS ORDERED that unless the required fee (\$1,430.00) for preparation of the Reporter's Transcripts is paid to the District Court Reporter ON OR BEFORE SEVEN (7) DAYS FROM THE DATE OF THIS ORDER, this appeal will proceed on the Clerk's Record only.

DATED this 16th day of September, 2015.

For the Supreme Court


Karel A. Lehrman, Chief Deputy Clerk for
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter Kathy J. Klemetson
District Judge Juneal C. Kerrick

Entered on JSI
By: kg

ORDER RE: PAYMENT OF FEE FOR TRANSCRIPTS – Docket No. 43296-2015

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DAVID KOSMANN,)	
)	
Plaintiff-Respondent,	)	Supreme Court No. 43296-2015
)	
-vs-	)	CERTIFICATE OF SERVICE
)	
LEO GILBRIDE,)	
)	
Defendant-Appellant.)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

James G. Reid, 1211 W. Myrtle, Suite 350, Boise, Idaho 83702

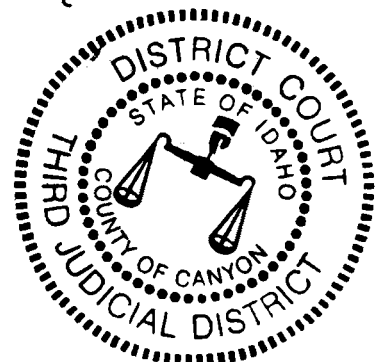
Kevin Dinius, Dinius & Assoc., 5680 E. Franklin Rd., Suite 130
Nampa, Idaho 83687

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 2nd day of November, 2015.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: *K. Waldemer* Deputy

CERTIFICATE OF SERVICE



TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720

DOCKET NO. 43296-2015

(
(DAVID KOSMANN
(
(vs.
(
(LEO GILBRIDE
(

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on October 30, 2015, I lodged 0 & 3 transcripts of 450 pages in length, consisting of Jury Trial, January 27-29, 2015, for the above-referenced appeal with the District Court Clerk of the County of Canyon in the Third Judicial District.

Katherine J. Klemetson, RPR, CSR #436

(Date)